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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 188

EDWARD H. TITUS, PETITIONER,

vs.

LOU C. WALLICK

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

PETITION FOR CERTIORARI FILED JULY 8, 1938.

CERTIORARI GRANTED OCTOBER 10, 1938.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 188

EDWARD H. TITUS, PETITIONER,

vs.

LOU C. WALLICK

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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[fol. 1]

IN COURT OF COMMON PLEAS OF FRANKLIN COUNTY

No. 143,633

EDWARD H. TITUS, Plaintiff,

vs.

LOU C. WALLICK, Defendant

Docket and Journal Entries

1934.

Aug. 20. Petition filed, with transcript.
" 20. Precipe filed. Summons issued Shrff. Franklin Co., O. Ret. Sep. 3, 1934. Ans. Sep. 22, 1934.
Sept. 7. Precipe filed. Alias summons issd. Shff. Frank. Co. Ret. Sept. 17, 1934. Ans. Oct. 6, 1934.
" 22. Motion & Memo. of Deft. filed.
" 27. Matter referred back to Notary Public for further questioning as to first three (3) questions only, as per entry 293-672 Re.
" 27. Motion to quash & set aside service of summons of Aug. 20, 1934, is sustained, as per entry 307-428 Le.
Oct. 6. Answer of deft. filed. Copy 75 cts.
" 26. Motion & Memo. of Pltff. filed.
Nov. 14. Ans. Memo. of Deft. filed.
" 23. Motion of Pltff. overruled, Pltff. excepts, as per entry 310-20 Ra.

1935.

Feb. 20. Motion & Memo. of Pltff. filed.
Mar. 19. Ans. Memo of Deft. etc. filed.
Apr. 29. Motion of Pltff. overruled, Pltff. excepts, as per entry 312-369 Ra.
May 9. Reply of Plaintiff filed.
Oct. 17. Cause continued for trial to Dec. 10, 1935, or as soon thereafter as is possible, as per entry 314-682 Kg.
" 17. Deft. leave to file Amended Answer, Pltff. leave to file Reply by Oct. 31, 1935, as per entry 314-681 Kg.
" 17. Amended Answer of Def. etc. filed Copy 50¢.

Docket and Journal Entries—continued

1935.

Nov. 8. Amendment to Amended Answer of Def. filed.
" 8. Deft. leave to file amendment to his Amended
[fol. 2] Answer, as per entry 308-563 Le.
Nov. 22. Demurrer & Memo. etc. of Plaintiff filed.
Dec. 7. Answer to interrogatories filed.
" 7. Demurrer of Pltff. overruled, Pltff. excepts, as entry 318-221 Kg.
" 11. Motion and Memo. of Deft. filed.

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Jan. 14. Pltff. leave to file Reply, as per entry 309-502 Kg.
" 14. Motion of Deft. overruled, Deft. excepts, as per entry 308-614 Kg.
" 14. Reply of Plaintiff filed.
" 21. Certificate of Steno. A. & O. filed $4.00.
Feb. 3. Depositions on behalf of Plaintiff filed (no costs taxed).
" 4. Opening Brief of Deft. on the merits filed.
" 24. Defendant's Reply Brief filed.
Apr. 24. Request to separately state conclusions of fact from conclusions of law filed.
" 24. Motion for new trial filed.
" 24. Motion of Plff. filed.
June 22. Memo. opposing Pltffs. motion for a new trial filed.
Sept. 19. Decision etc. Judge Leach filed.
Dec. 3. Motion of Pltff. overruled, Pltff. excepts, as entry 323-359 Le.
" 2. Jury waived, Issues joined for Deft. Motion of Pltff. for new trial notwithstanding decision of court overruled, judgment for Deft. against Pltff. & he go hence without day & recover of Pltff. his costs, Pltffs. except, as to finding & ruling on Pltff.'s exhibit "D", Deft. excepts, 323-359 Le.
" 8. Notice of appeal filed.
" 8. Precipe filed Order issued for transcript of docket & journal entries together with original papers in above cause.

1937.

Feb. 24. Nunc Pro tunc Journal Entry.

[fol. 3] [Title omitted]

ORDER AS TO TESTIMONY—Filed September 27, 1934

This cause came on for hearing on the certification of the notary public before whom the deposition of the defendant was being taken on the 19th day of September, 1934, for instructions of the court as to the course to be pursued because of defendant's refusal to answer certain questions, and the matter having been argued by counsel and submitted to the court, the court finds that the first three questions involved are proper and that the witness should answer the same if he possess the knowledge in connection therewith, but that the remaining questions are irrelevant, immaterial and incompetent and that the defendant is within his lawful rights in refusing to answer the same.

Wherefore, it is hereby decreed and ordered that this matter be and is hereby referred back to said notary public and that said notary public be and he hereby is instructed and directed to require answers to the first three questions involved in said certification if the defendant possesses the knowledge in connection therewith, and that he, said notary public, shall take no further action with reference to the other questions.

Reynolds, Judge.

ORDER SUSTAINING MOTION TO QUASH—Filed September 27, 1934

By consent of counsel the motion to quash and set aside the purported service of summons issued herein, under date of August 20, 1934, is sustained.

Leach, Judge.

[fol. 4] ORDER OVERRULING MOTION TO STRIKE—Filed November 23, 1934

This cause came on for hearing on the motion of the plaintiff to strike from the files the answer herein and upon the briefs of the parties and the oral statements and arguments of counsel, and the same was submitted to the court, and the court finds that the motion is not well taken and should be overruled.

Wherefore, it is hereby ordered, adjudged and decreed that the motion of the plaintiff to strike from the files the answer herein be and the same is hereby overruled.

To all of the above the plaintiff excepts.

Randall, Judge.

ORDER DENYING MOTION FOR REHEARING—Filed April 29, 1935

This cause came on for hearing on the motion of the plaintiff for a rehearing of plaintiff's motion requesting that the answer of the defendant be stricken from the files, on the evidence and briefs of counsel and was submitted to the court, and the court upon consideration of the same finds that said motion for rehearing is not well taken and should be denied.

Wherefore, it is hereby ordered and decreed that the motion of the plaintiff for a rehearing of his motion requesting that the answer of the defendant be stricken from the files be and the same is hereby denied and overruled.

To all of the above findings and order the plaintiff excepts.

Randall, Judge.

ORDER—Filed October 17, 1935

This cause came on for hearing on the oral motion of the defendant for a continuance over of the trial of the above case on its merits, and was submitted to the court, and good cause being shown, it is hereby ordered that said motion be sustained and that said cause be continued and set for trial on Dec. 10th, 1935, or as soon thereafter as can be reached.

King, Judge.

[fol. 5] ORDER—Filed October 17, 1935

Upon good cause shown defendant is hereby given leave to file instanter his Amended Answer with interrogatories annexed; plaintiff given leave to file his reply on or before Oct. 31, 1935.

King, Judge.

ORDER—Filed November 8, 1935

Upon good cause shown, the defendant is hereby given leave to file an amendment to his amended answer instanter.

Leach, Judge.

ORDER OVERRULING DEMURRER—Filed December 7, 1935

This cause came on to be heard upon the demurrer of the plaintiff to the interrogatories annexed to defendant's amended answer, upon consideration whereof the court finds that said demurrer is not well taken and does hereby overrule the same, to which ruling and order plaintiff excepts.

King, Judge.

ORDER—Filed January 14, 1936

Upon application of the plaintiff for good cause shown plaintiff is given leave to file his reply instanter.

King, Judge.

ORDER RE ANSWER—Filed January 14, 1936

This cause came on to be heard upon the motion of the defendant for an order to require the plaintiff to plainly and fully answer Interrogatory No. 2 annexed to the amended answer; upon consideration whereof the court finds that said motion is not well taken and does hereby overrule the same, to which ruling and order the defendant excepts.

King, Judge.

[fol. 6] ORDER OVERRULING MOTION TO AMEND FINDING OF FACT—Filed December 3, 1936

This cause came on for hearing on the motion of the plaintiff requesting and moving the court to amend its finding of fact and was submitted to the court, upon consideration whereof the court finds that said motion is not well taken and should be overruled.

Wherefore, it is hereby ordered, adjudged and decreed that said motion of the plaintiff be and the same is hereby overruled, to which the plaintiff excepts.

Leach, Judge.

JUDGMENT—Filed December 3, 1936

The parties by their attorneys come, by agreement waive a jury with the consent of the court and submit this cause to the court on the pleadings and evidence, and arguments and briefs of counsel, on consideration whereof the court finds on the issues joined, for the defendant.

Whereupon, the plaintiff files his motion for an order setting aside the decision rendered by the court and granting a new trial and for a judgment in his favor notwithstanding the decision of the court; and his motion that the court rule upon the admissability of plaintiff's exhibit "D" and defendant's exhibits numbered 1, 2, 3, 4, 5, 6, 7, 8 and 9 and that the court rule upon the motions made by plaintiff at the close of defendant's evidence and at the close of all of the evidence. And said motions are submitted to the court on consideration whereof the court finds that the motion for an order setting aside the decision rendered by the court and granting a new trial and for a judgment in plaintiff's favor notwithstanding the decision of the court is not well taken and should be overruled. The court further finds that each and all of said exhibits are admissable in evidence in this cause and further finds that the motions made by the plaintiff at the close of all the evidence should be overruled and that there were no motions made by the plaintiff at the close of the defendant's evidence.

[fol. 7] Wherefore, it is hereby ordered, adjudged and decreed that plaintiff's exhibit "D" and defendant's exhibits numbered 1, 2, 3, 4, 5, 6, 7, 8 and 9 be and the same are admitted in evidence in this cause and that the motions made by the plaintiff at the close of all of the evidence be and the same are hereby overruled and that the motion of the plaintiff for an order setting aside the decision rendered by the court herein and granting a new trial, and for a judgment in plaintiff's favor notwithstanding the decision of the court, be and the same is hereby overruled and it is therefore considered that said defendant go hence without day and recover of said plaintiff, his costs herein.

Judgment is rendered against the plaintiff for the costs herein.

To all of the above findings, ruling and orders (excepting as to the finding and ruling on plaintiff's exhibit "D") the plaintiff excepts. As to the finding and ruling on plaintiff's exhibit "D", the defendant excepts.

Leach, Judge.

[fol. 8] IN COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

[Title omitted]

PETITION

By consideration of the Supreme Court in and for the County of New York, in the Borough of Manhattan, City of New York, on the 1st day of May, 1934, the plaintiff recovered a judgment against the defendant in the sum of Three Hundred Seventy-seven Thousand, Eight Hundred Twenty-one and 30/100 ($377,821.30) Dollars, with interest from January 1, 1934 on the sum of Two Hundred Fifty Thousand, Fourteen and 78/100 ($250,014.78) Dollars amounting to the sum of Six Thousand, Three Hundred Thirty-three and 71/100 ($6333.71) Dollars, together with the costs duly taxed in the sum of Four Thousand, Nine Hundred Forty-eight and 20/100 ($4948.20) Dollars, making in all the sum of Three Hundred Eighty-nine Thousand, One Hundred Three and 21/100 ($389,103.21) Dollars, a certified copy of the transcript whereof is hereby duly attached. Said court was a court of general jurisdiction duly created by the laws of the State of New York. No part of said judgment has been paid.

Wherefore, plaintiff asks judgment against the defendant in the sum of Three Hundred Eighty-nine Thousand, One Hundred Three and 21/100 ($389,103.21) Dollars, with interest.

(Signed) Hartman, Sheridan, Tekeelsky & Pecora, Vorys, Sater Seymour & Peace, Attorneys for Edward H. Titus.

[fol. 9] *Duly sworn to by Lowry F. Sater. Jurat omitted in printing.*

[fol. 10] EXHIBIT "A"

The People of the State of New York, by the Grace of God Free and Independent, to all to whom these presents shall come or may concern, Greeting:

(Seal.)

Know Ye, That we having examined the records and files in the office of the Clerk of the County of New York and Clerk of the Supreme Court of said State for said County, do find a certain Summons, Amended Complaint, Amended Answer Exhibit and Judgment there remaining, in the words and figures following, to wit:

26971

[fol. 11] NEW YORK SUPREME COURT, COUNTY OF NEW YORK

EDWARD H. TITUS, Plaintiff,

against

LOU C. WALLICK, Defendant

SUMMONS

To the above named Defendant:

You are Hereby Summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this Summons, to serve a notice of appearance, on the Plaintiff's Attorney, within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, Judgment will be taken against you by default for the relief demanded in the complaint.

Dated, December 21st, 1925.

Wallace R. Foster, Plaintiff's Attorney, Post Office Address and Office, No. 140 Nassau Street, Borough of Manhattan, City, County and State of New York.

[fol. 12] NEW YORK SUPREME COURT, COUNTY OF NEW YORK

EDWARD H. TITUS, Plaintiff,

against

LOU C. WALLICK, Defendant

SECOND AMENDED COMPLAINT

The plaintiff, by Wallace R. Foster, his Attorney, complaining of the defendant for a second Amended Complaint, alleges, upon information and belief:

I. That the Secor Hotel Company, was a corporation organized under the laws of the State of Ohio, in April 1908, having capital stock of One Hundred Thousand Dollars, represented by One Thousand shares of the par value of One Hundred Dollars each.

II. That the plaintiff now is and since in or about the month of October 1908, has been the owner of a one-quarter interest in said corporation, represented by 250-shares of the said capital stock of said corporation.

III. That said The Secor Hotel Company, since from shortly after the date of its organization, has continuously operated and conducted, as the sole lessee thereof, a hotel in the City of Toledo, Ohio, known as the "Secor Hotel", except that, as plaintiff has been recently informed, the said defendant has attempted to supercede the rights of said The Secor Hotel Company, by some substitution of the lessee or operator of said hotel, retaining however, in himself the full control thereof, and which change in lessee or operator of said hotel, if any, was made without the knowl-[fol. 13] edge or consent of this plaintiff, and that this plaintiff has been unable with due diligence to ascertain the exact nature of such change, if any.

IV. That the average net earnings to the lessee resulting from the operation of said hotel during the fifteen years immediately preceding the time of the commencement of this action has annually exceeded the sum of Ten thousand dollars.

V. That on or about October 27th, 1908, this plaintiff, for the benefit and at the request of the defendant and one London I. Wallick, a brother of the defendant, consented

and agreed that the two hundred and fifty shares of stock of The Secor Hotel Company so owned by the plaintiff, be pledged with Lord & Taylor of New York City, as collateral security for the payment to said Lord & Taylor for furnishings sold and to be sold to said Wallick Brothers and to said The Secor Hotel Company, and that plaintiff's said stock was thereupon so pledged together with the stock held by said Wallick Brothers.

VI. That at time of the pledge by plaintiff of said stock as set forth in paragraph "V" hereof, and until on or about November 13, 1913, said named Wallick Brothers individually were the equal owners of the balance of the capital stock of said The Secor Hotel Company, and that on or about the last named date, the defendant acquired and became the owner, and is still the owner, of all the rights and interests of said London I. Wallick, in the said corporation and hotel including all his stock holdings therein.

[fol. 14] VII. That on or about December 1, 1911, and shortly prior thereto, the defendant, at the City of New York, N. Y. stated and represented to plaintiff that the aforesaid indebtedness to Lord & Taylor, was still unpaid, although reduced in amount to approximately sixty thousand dollars or thereabouts; that payment of said balance was being urgently requested; that he, the said defendant, was borrowing large amounts of money, particularly in the State of Ohio, and that it would be greatly aidful to him in the operation of his business affairs, and particularly aidful and beneficial to the Secor Hotel Company, and its stockholders, if the said Lord & Taylor indebtedness were paid and he were enabled to use the aforesaid certificates of stock of this plaintiff together with his own securities in the negotiation and procurement of certain new or further loans, and did state and represent to this plaintiff that for convenience in connection therewith and in order to enable him successfully to carry out his above plan for securing loans of moneys and in advancing the interests and prosperity of the said The Secor Hotel Company, his attorney at Toledo, Ohio, a Mr. Elmer E. Davis, had advised that some special written evidence of right or authority so to use plaintiff's certificates was necessary; that the defendant produced a paper or writing which he stated had been prepared by said attorney (as to whom the defendant then

stated said attorney was acting and had acted in the interests of plaintiff as well as of defendant) requesting plaintiff to sign said paper; that plaintiff hesitated about signing the same and expressed such hesitation and reluctance to the defendant; that defendant then stated to plaintiff [fol. 15] that all matters would be worked out that the said certificates could be and would be returned and restored to plaintiff, urging plaintiff to continue to stand by and assist him.

VIII. That the plaintiff having implicit confidence in the integrity and reliability of the defendant, and believing the aforesaid statement, representations and assurance of the defendant, and relying thereon, and upon the promise and agreement to return and restore the said certificates and rights of plaintiff and for no other reason or consideration whatsoever, did on or about the 1st day of December 1911, at the City of New York, execute and thereupon deliver to the defendant personally, the aforesaid paper or writing, which said paper or writing, according to plaintiff's recollection thereof, purported to transfer to said attorney the aforesaid certificate or certificates representing plaintiff's said one-quarter interest in said corporation.

IX. That the execution of the writing, purporting to transfer the aforesaid certificates as described in the last preceeding paragraph, was intended to be and in truth and fact was for the sole benefit and advantage of the defendant; that any relation thereto on the part of said attorney as grantee, transferee, representative, agent or otherwise, was solely for and on behalf of the defendant and in which or under which the said attorney neither acquired, obtained, nor possessed any rights or interests except for and on behalf of the defendant to be exercised solely and exclusively at the instance and direction of the defendant.

X. That upon frequent occasions throughout the entire period from subsequent to the execution of the paper described in the last preceeding paragraph hereof on or about the 12th day of September 1923, the plaintiff from time to [fol. 16] time, talked with the defendant concerning the restoration and return of the aforesaid certificates of stock asking that the same be returned and that upon such occasions the defendant promised and agreed to restore and return the same and to give and render a full accounting

thereunder to plaintiff, assuring plaintiff at all such times that the same would be done, but the defendant has wholly neglected and failed to restore or return the said certificates to this plaintiff or to cause the same or the rights thereunder or arising therefrom to be returned or restored and that neither the said certificates, representing the aforesaid two hundred and fifty shares of stock or any part thereof, or any rights thereunder have been delivered to or received by or transferred to this plaintiff nor has any accounting whatsoever been rendered, although due demands therefor has been made upon the defendant as aforesaid.

XI. That on or about the 15th day of December, 1925, a written demand for the return of said certificates and for an accounting thereunder of the moneys accruing to the credit of the aforesaid shares of stock, was duly personally served upon the defendant.

XII. That the aforesaid Lord & Taylor account together with any other account, loan or other transaction wherein or in connection wherewith the aforesaid certificates were, or lawfully could be pledged as security by the defendant or for his use and benefit, has been fully cancelled and discharged and was so cancelled and discharged prior to on about the 15th day of December, 1925.

XIII. That the retention by the defendant of the said certificates and of the rights therein and thereunder and his continued promises and assurances to restore and return the same and to account therefor to the plaintiff, as herein- [fol. 17] before set forth, was done with intent on the part of the defendant to deceive the plaintiff and to forestall, delay and prevent any action on the part of the plaintiff seeking the recovery of his said property and rights that the procuring of the execution and delivery of the instrument described in paragraphs "VII" and "VIII" hereof was in furtherance of the defendant's plan to defraud the plaintiff and that such plan and fraud was fully, carefully, deliberately and successfully concealed from this plaintiff until on or about the 12th day of September 1923, when the plaintiff again asked the defendant concerning the restoration of said stock and rights and in which conversation the defendant for the first time, either directly or indirectly, disclosed that he did not recognize the title or interest of the plaintiff in the aforesaid stock, and then and there, for

the first time, claimed or asserted that the plaintiff had parted with his rights therein and thereto or claimed or asserted that nothing was due to the plaintiff on account thereof; and that the information thus obtained by said plaintiff on said last named date of the said intended fraud, and of said fraud, and of the facts indicating the said fraud, constituted and in truth and in fact was the discovery thereof and that such discovery was made within six years prior to the commencement of this action.

XIV. That the plaintiff had no notice, knowledge or information of the intended retention and appropriation of his said property by the defendant as herein before set forth, until the conversation of on or about the 12th day of September, 1923, described in the last preceding paragraph.

XV. That this plaintiff has no adequate remedy at law.

Wherefore, The plaintiff asks judgment:

[fol. 18] 1. That the defendant be directed and required to deliver to the plaintiff the aforesaid certificate or certificates of stock or to cause to be issued and delivered to the plaintiff such new certificate or other certificates or other instrument as may be necessary fully to restore and return the title to the aforesaid one-quarter ownership in The Secor Hotel Company.

2. That an account be taken of the earnings of The Secor Hotel Company and of any successor thereof subsequent to December 1911, and of the sums that have been received by the defendant as dividends or otherwise and particularly with respect to the moneys applicable to the plaintiff's said shares of stock.

3. That the defendant be decreed to pay over to the plaintiff any moneys in his hands or under his control found to be due to the plaintiff under an accounting and that plaintiff have judgment therefor.

4. For such other and further relief, together with the costs of this action, as may be just.

Wallace R. Foster, Attorney for Plaintiff, Office & P. O. Address, 140 Nassau Street, Borough of Manhattan, City of New York.

[fol. 19] State of New York,
County of New York, ss:

Wallace R. Foster, being duly sworn, says: That he is attorney for the plaintiff in the above entitled action. That the foregoing Second Amended Complaint is true to the knowledge of deponent, except as to the matters which are stated to be alleged on information and belief, and as to those matters he believes it to be true.

Deponent further says: That the reason why this verification is made by deponent and not by the plaintiff is that said plaintiff is not within said County of New York where deponent has his office. The sources of deponent's knowledge and the ground of his belief as to all the matters not stated upon his knowledge in said Second Amended Complaint are as follows: Deponent has had a large number of conversations with the plaintiff in this action, and has inspected certain papers relating to the cause of action which are in deponent's possession, also affidavits in his possession relating to matters stated, in said Second Amended Complaint, and his information regarding the facts set forth in the Second Amended Complaint has been derived from such interviews, consultations and inspection of papers and affidavits.

Wallace R. Foster.

Sworn to before me, this 14th day of June, 1926. Elizabeth J. Vail, Notary Public, New York County. New York County Clerk's No. 99. New York County Register's No. 7119. Certificate filed in Kings County. Clerk's No. 20, Register's No. 7069. Commission expires March 30, 1927.

[fol. 20] Supreme Court, New York County

Edward H. Titus, Plaintiff,

against

Lou C. Wallick, Defendant

Second Amended Answer

I. The defendant for an amended answer to the amended complaint of the plaintiff and the second count or paragraph thereof, denies each and every allegation therein contained.

II. The defendant, in further answering the third count or paragraph of the plaintiff's complaint, admits that the Secor Hotel Company since its organization has continually operated and conducted as the sole lessee thereof, a hotel in the City of Toledo, State of Ohio, known as the Secor Hotel, and denies each and every other allegation therein contained.

III. That defendant answering the fifth count or paragraph of the plaintiff's complaint, denies each and every allegation therein contained.

IV. The defendant, answering the sixth count or paragraph of plaintiff's complaint, admits that on or about November 13th, 1913, the defendant acquired and became the owner and still is the owner of all the rights and interests and stockholdings of London I. Wallick in the said Secor Hotel Company, and denies each and every other allegation therein contained.

V. The defendant, answering the seventh, eighth, ninth and tenth counts or paragraphs of the plaintiff's complaint, [fol. 21] denies each and every allegation therein contained.

VI. The defendant in further answering the twelfth count or paragraph of the plaintiff's complaint, denies each and every allegation therein contained, except the defendant admits that the account of Lord & Taylor, for which said certificates of stock were at one time pledged as security, has been fully paid.

VII. The defendant, answering the thirteenth and fourteenth counts or paragraphs of the plaintiff's complaint, denies each and every of the allegations therein contained.

VIII. The defendant, answering the fifteenth count or paragraph of the plaintiff's complaint, upon information and belief, denies each and every allegation therein contained, and alleges that the plaintiff has a full and adequate remedy at law.

IX. The defendant, further answering the plaintiff's amended complaint, and for a first separate defense herein alleges that on or about October 27th, 1908, this defendant and one London I. Wallick, were copartners and engaged in carrying on the business among other things, of hotel keepers of the Hotel Secor, at Toledo, Ohio, and were each the

owner of five hundred (500) shares of the capital stock of the Secor Hotel Company, and on that day this defendant and London I. Wallick duly endorsed said stock in blank and delivered the same to Lord & Taylor as collateral security for an indebtedness, then owing by them to the said Lord & Taylor, in which the above named plaintiff was then the Treasurer, and took a receipt of the said "Lord & Taylor E. H. Titus, Treasurer", two of which said certificates were numbered 1 and 7 for one hundred and twenty-five (125) [fol. 22] shares each, number 1 of which was issued to London I. Wallick, and number 7 of which was issued to this defendant.

X. And this defendant in further answering, alleges as a part of said first separate defense, upon information and belief, that the shares above set forth were the certificates which were set forth in the plaintiff's complaint, representing the one-fourth interest, of which the plaintiff alleges he is owner of the Secor Hotel Company, and not otherwise or different.

XI. The defendant in further answering, alleges as a part of said first separate defense herein, upon information and belief, that there never were any certificates of stock for two hundred fifty (250) shares, or any other number of shares issued to the plaintiff or endorsed by the plaintiff in blank and delivered to Lord & Taylor, as alleged and set forth in the fifth count or paragraph of the plaintiff's complaint.

XII. The defendant for a second separate and further defense herein, alleges that if the plaintiff ever had possession of, as set forth in paragraphs second and fifth of the plaintiff's amended complaint, a one-fourth or quarter interest in the Hotel Secor Company, evidenced by certificates of shares of stock to the extent of two hundred fifty (250) shares, that the same was obtained by the plaintiff from London I. Wallick and this defendant, not by gift and without any consideration whatsoever.

XIII. The defendant in further answering for a third separate defense herein, alleges that any right, title or interest the plaintiff had or ever had in the stock of the Secor Hotel Company, said plaintiff did on the 5th day of December 1911, by an instrument in writing, sell, assign, transfer, [fol. 23] set over and deliver to Elmer E. Davis, all his

right, title and interest in and to any and all stock of the Secor Hotel Company, which he then had or ever had, a copy of which transfer and assignment is hereto annexed, marked Exhibit A, and made a part of this defendant's answer herein.

XIV. The defendant in further answering alleges that the supposed cause of action set forth in the plaintiff's complaint herein, did not accrue at any time within six (6) years next before the commencement of this action.

XV. The defendant in further answering, alleges that the supposed cause of action set forth in the plaintiff's complaint herein, did not accrue at any time within ten (10) years next before the commencement of this action.

Wherefore, defendant demands judgment dismissing the plaintiff's complaint, with costs.

L. E. Warren, Attorney for Defendant, Office & P. O. Address, 36 West 44th Street, Borough of Manhattan, City of New York.

[fol. 24] EXHIBIT "A" TO SECOND AMENDED ANSWER

Transfer of Stock

Know All Men by These Presents, that I, E. H. Titus, of New York City, New York, in consideration of One Dollars and other good and valuable considerations to me paid by Elmer E. Davis, of Toledo, Ohio, and the receipt of which is hereby acknowledged, do hereby Bargain, Sell, Assign, Transfer and Convey, to said Elmer E. Davis, all the right, title and interest which I now have in and to Certificates Nos. 1 and 7, each of said certificates being for one hundred and twenty-five (125) shares of the capital stock of The Secor Hotel Company, a corporation of Toledo, Ohio. Said certificate No. 1 for one hundred and twenty-five shares of stock having been heretofore bargained, sold, transferred and assigned to me by London I. Wallick, by written assignment dated October 27, 1908; and said certificate No. 7, for one hundred and twenty-five shares of stock having been heretofore bargained sold, transferred and assigned to me by Lou C. Wallick, by written assignment dated October 27, 1908.

Both said above described certificates of stock were transferred and assigned to me subject to the rights of Lord & Taylor, of New York City, New York, to hold the same as collateral security to secure the payment of the indebtedness which was then due and owing to Lord & Taylor from Wallick Bros. a partnership composed of Lou C. Wallick and London I. Wallick.

And it is hereby understood and agreed by and between me and the grantee herein named, that in acquiring said stock from me, the said grantee takes it subject to the rights [fol. 25] of Lord & Taylor to hold the same as collateral security for the payment of their said indebtedness against Wallick Bros.

In other words, I only sell and convey to the grantee herein named, such right, title and interest in and to said stock as I acquired from Lou C. Wallick and London I. Wallick.

And I hereby authorize, instruct and direct Lord & Taylor to deliver said two above mentioned and described certificates of stock to said Elmer E. Davis, or his order, instead of to me.

Edward H. Titus.

[fol. 26] City and County of New York, ss:

Lou C. Wallick, being duly sworn, deposes and says that he is the defendant in this action; and he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

L. C. Wallick.

Sworn to before me this 19th day of May, 1926. Charles J. Herson, Notary Public. New York Co. Clerk's No. 151. My Commission expires March 30, 1927.

[fol. 27] At a Special Term, Part III, of the Supreme Court, held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City of New York, on the 1st day of May, 1934.

Present: Hon. Edward J. McGoldrick, Justice.

EDWARD H. TITUS, Plaintiff,

against

LOU C. WALLICK, Defendant

The above named Edward H. Titus, the plaintiff herein, having appealed to the Appellate Division of the Supreme Court, First Department, from a judgment of the Supreme Court, County of New York, entered in the office of the Clerk of the County of New York, on February 16, 1931, dismissing his complaint on the merits and granting judgment to the defendant with costs, and the said Appellate Division of the Supreme Court, First Department, having by an order dated February 26, 1932, and filed March 11, 1932, ordered the reversal of the said judgment with costs, and granting judgment to the plaintiff with costs and the order of the Appellate Division having been filed in the office of the Clerk of the County of New York, on March 12, 1932.

And the said judgment of reversal having been entered in the office of the Clerk of the County of New York on March 16, 1932, providing among other things that the defendant transfer and deliver to the plaintiff 250 shares of the capital stock of the Secor Hotel Company, representing a one-[fol. 28] quarter interest therein and that an account be taken of the sums distributed as earnings of the Secor Hotel Company subsequent to October 27, 1908 and of the sums received by the defendant as dividends or otherwise, together with interest thereon and particularly with respect to the moneys applicable to the plaintiff's one-quarter interest in the said Secor Hotel Company.

And the defendant having appealed from the said order and judgment to the Court of Appeals and the Court of Appeals having affirmed the said judgment and the judgment of affirmance having been entered in the office of the Clerk of the County of New York on July 25, 1932,

And this Court having by an order made and entered herein on May 11, 1932, appointed Edmund M. McCarthy, Esq., as Referee, to take and state the defendant's account, and the report of the said Referee having been filed in the office of the Clerk of the County of New York on February 24, 1933,

And this Court having by an order made and entered herein on April 20, 1933, vacated the report of the said Referee,

And the defendant having appealed from the said order to the Appellate Division of the Supreme Court, First Department, and said Appellate Division of the Supreme Court having by an order dated October 13, 1933, affirmed the said order appealed from and modified the same by providing that the issues as laid down by the interlocutory judgment filed herein on March 16, 1932, and the order of reference of this Court dated May 11, 1932, be referred to Hon. Jeremiah T. Mahoney, as Referee, to take and state the defendant's account, and the report of the said Hon. Jeremiah T. Mahoney, as Referee, finding that the defendant be ordered [fol. 29] to account to the plaintiff for the sum of $377,821.30, said sum being inclusive of interest to December 31, 1935, as well as the decision, testimony and exhibits having been filed herein on March 29, 1934,

And the plaintiff having by notice of motion dated March 30, 1934, moved to confirm the said report and for final judgment thereon,

Now, upon reading and filing the notice of motion dated March 30, 1934, the filed judgment of reversal dated March 16, 1932, the filed interlocutory judgment dated July 25, 1932, the order and resettled order appointing Edmund M. McCarthy, Referee, the order of Mr. Justice Untermyer, made and entered herein on April 20, 1933, vacating the report of Edmund M. McCarthy as Referee, the order of the Appellate Division of the Supreme Court, First Department, dated October 13, 1933, affirming the order of Mr. Justice Untermyer appealed from and modifying the same and appointing Hon. Jeremiah T. Mahoney as Referee, the decision and the report of Hon. Jeremiah T. Mahoney, as Referee, together with the testimony and exhibits before said Referee, together with the testimony and exhibits before said Referee and also the report and decision of the previous Referee and the testimony and exhibits taken before him.

And the plaintiff having appeared by Hartman, Sheridan, Tekulsky & Pecora, Thomas I. Sheridan, of counsel, in support of this motion to confirm the report, and the defendant having appeared by Samuel D. Jones his attorney, in opposition thereto, and due deliberation having been had thereon, and upon filing the opinion of the court, it is

[fol. 30] Ordered, that the report of Hon. Jeremiah T. Mahoney as Referee herein, filed in the office of the Clerk of the

County of New York on March 29, 1934 be, and the same is hereby, in all respects, confirmed; and, it is further

Ordered, Adjudged and Decreed, that the plaintiff Edward H. Titus recover of the defendant Lou C. Wallick, the sum of $377,821.30, with interest from January 1, 1934 on the sum of $250,014.78, amounting to the sum of $6,333.71 together with the costs duly taxed in the sum of $4,948.20 making in all the sum of $389,103.21, and that the plaintiff have execution therefor against the defendant.

Enter:

E. J. McG., J. S. C.

Albert Marinelle, Clerk.

[fol. 31] Filed Common Pleas Court, Aug. 20, 1934.
Filed Court of Appeals Dec. 8, 1936.
Filed Supreme Court Mar. 8, 1938.

All of which we have caused these presents to be exemplified and the seal of our said Supreme Court to be hereunto affixed.

Witness, Hon. John L. Walsh a Justice of the Supreme Court for the County of New York, the 22nd day of June in the year of our Lord one thousand nine hundred and 34, of our independence the one hundred and fifty-seven.

(Signed) Albert Marinelli, Clerk. (Seal.)

John L. Walsh a presiding Justice at a Special Term of the Supreme Court of the State of New York for the County of New York, do hereby certify that Albert Marinelli whose name is subscribed to the preceding exemplification, is the Clerk of the said County of New York, and Clerk of said Supreme Court for said County duly elected and sworn, and that full faith and credit are due to his official acts. I further certify that the Seal affixed to the exemplification is the seal of our said Supreme Court, and that the attestation is in due form.

Dated, New York, June 22, 1934.

(Signed) John L. Walsh, Justice of the Supreme Court of the State of New York.

State of New York,
County of New York, ss:

I, Albert Marinelli Clerk of the Supreme Court of said State in and for the County of New York, do hereby certify

that Hon. John L. Walsh, whose name is subscribed to the preceding certificate, is Presiding Justice at a Special Term of the Supreme Court of said State in and for the County of New York, duly elected and sworn, and that the signature of said Justice to said certificate is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court this 23rd day of June 1934.

Albert Marinelli, Clerk. (Seal.)

[fol. 32] In Court of Common Pleas of Franklin County

Summons and Return—Filed September 12, 1934

To the Sheriff of said County, Greeting:

You are commanded to notify Lou C. Wallick, Deshler Hotel, that he has been sued by Edward H. Titus, in the Court of Common Pleas of Franklin County, and that unless he answer by the 22nd day of September in the year of our Lord, one thousand nine hundred and thirty four, the petition of said plaintiff against him, filed in the Clerk's office of said county, such petition will be taken as true and judgment rendered accordingly.

You (the Sheriff) will make due return of this summons, on the 3rd day of September, A. D. 1934.

Witness my hand and the seal of said Court this 20th day of August, A. D. 1934.

Charles E. King, Clerk of the Court of Common Pleas of Franklin County, Ohio, (Signed) by W. W. Price, Deputy.

Sheriff's Return

The State of Ohio,
Franklin County:

Received this writ August 21, 1934, at 9 o'clock A. M., and pursuant to its command all the endorsements thereon.

On August 28, within named Lou C. Wallick by leaving for him at his usual place of residence, a true and certified copy of this writ with all the endorsements thereon.

Ross E. Anderson, Sheriff of Franklin County, O., by O. D. Brown, Deputy.

Sheriff's Fees:

Service	.75
Mileage	.40
Total	1.15

[File endorsement omitted.]

26971.

[fols. 33-42] In Court of Common Pleas of Franklin County

Summons and Return—Filed September 27, 1934

To the Sheriff of said County, Greeting:

You are commanded to notify Lou C. Wallick that he has been sued by Edward H. Titus in the Court of Common Pleas of Franklin County, and that unless he answer by the 6 day of Oct. in the year of our Lord, one thousand nine hundred and thirty-four, the petition of said plaintiff against him, filed in the Clerk's office of said county, such petition will be taken as true and judgment rendered accordingly.

You (the Sheriff) will make due return of this summons, on the 17 day of Sept. A. D. 1934.

Witness my hand and the seal of said Court this 7 day of Sept. A. D. 1934.

Charles E. King, Clerk of the Court of Common Pleas of Franklin County, Ohio, (Signed) by W. W. Price, Deputy.

Sheriff's Return

The State of Ohio,
Franklin County:

Received this writ September 7, 1934, at 4 o'clock P. M., and pursuant to its command, on September 8, 1934, I served the within named Lou C. Wallick by personally handing to him a true and certified copy of this writ with all the endorsements thereon.

I also, on —— —, 193-, served the within named —— —— by leaving for each of them at their usual place of residence, a true and certified copy of this writ with all the endorsements thereon.

Ross E. Anderson, Sheriff of Franklin County, O., by T. A. Donovan, Deputy.

Sheriff's Fees :

Service	.75
Mileage	.40
Total	1.15

26971.

[File endorsement omitted.]

[fol. 43] In Court of Common Pleas, Franklin County, Ohio

[Title omitted]

Answer—Filed October 6, 1934

For his answer to the petition filed herein the defendant says that the alleged judgment described in the petition, so far as it purports to be a personal judgment for money, is not a judgment which is to be given any faith or credit in this court, for the reason that said supposed judgment is in no way responsive to the issues tendered by the pleadings in the case in which said supposed judgment is alleged to have been rendered, and is in no way responsive to the matters, which by the record in said case were actually controverted.

Further answering the defendant says that there is nothing due to the plaintiff from the defendant on said supposed judgment.

Further answering the defendant says that he has in the courts of the State of New York taken an appeal from the said supposed judgment and that said appeal is now duly and regularly pending.

Further answering the defendant says that he is informed and therefore believes and alleges that the plaintiff is not the real party in interest in this action.

Further answering the defendant denies each and every allegation in the petition contained not herein specifically admitted to be true.

Wherefore, the defendant prays that he may go hence without day and have his costs herein.

(Signed) Butler and Summer, Attorneys for Defendant.

[fol. 44] *Duly sworn to by W. M. Summer. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 45] In Court of Common Pleas, Franklin County, Ohio

[Title omitted]

Motion to Strike—Filed October 26, 1934

Now comes the plaintiff and moves that the answer herein be stricken from the files as frivolous and interposed solely for the purpose of delay.

(Signed) Thomas A. Sheridan, Vorys, Sater, Seymour and Peace, Attorneys for Plaintiff.

Memorandum

This action is brought for the purpose of recovering upon a judgment rendered by the Supreme Court in the County of New York in the Borough of Manhattan, County of New York on the 1st day of May, 1934 as evidenced by a certified copy of the decree attached to and made a part of the petition.

Without attempting any multiplication of the authorities that might be summoned from every jurisdiction in support of this motion, we cite the following:

It is well settled that a record of adjudication by a court of record in a sister state, authenticated as by law provided, is entitled, under the full faith and credit clause of the United States Constitution, to such full faith and credit in the courts of the State of Ohio as it has by the law or usage in the courts of the state where the adjudication was had, if it appears that the court which rendered the judgment had jurisdiction over the subject matter and the person, or [fol. 46] over the res in a proceeding in rem, and that it is valid and conclusive in the courts of the foreign state."

23 O. Jur. Par. 466 citing many authorities.

"Under the full faith and credit clause of the Constitution of the United States, judgments rendered by courts of record of sister states, or the District of Columbia, with

jurisdiction of the subject matter and of the person, are, even if irregular or erroneous until set aside or reversed according to the regulations of the jurisdiction where rendered, final and binding and conclusive in Ohio upon the merits of the controversy therein adjudicated, against the parties to the record of the prior adjudication and those claiming under or through them. Such judgments cannot be questioned as to the liability imposed or amount thereof. No re-examination of the grounds on which they were rendered, can be permitted. Therefore, the foreign judgment may, under such circumstances, operate as a basis for the application of the doctrine of res judicata in a subsequent action brought in Ohio, and cannot be collaterally attacked."

23 O. Jur. Par. 469 citing numerous authorities also.

"As to the scope of the full faith and credit clause in the Constitution, it is now held by everyone of the state courts, in a host of authorities that when a judgment has been rendered in one state by a competent court with jurisdiction of the subject matter and of the person, that judgment is conclusive on the merits in the courts of every other state when the basis of an action or defense, and the merits cannot be re-investigated."

Symons v. Eichelberger, 110 O. S. 234.

"An Ohio court will enforce, and under the full faith and credit clause of the Federal Constitution, must enforce, a judgment rendered in Pennsylvania on a cognovit note made and payable in Pennsylvania, although the note contained a provision for an attorney's fee, and though such fee is included in the judgment; such a provision being valid in Pennsylvania though against public policy in Ohio."

Westwater v. Murray, 245 Fed. Rep. 427.

This case was tried before the Circuit Court of Appeals for the Sixth District, and the decision announced by Judge Warrington.

"Judgment in a sister state cannot be impeached here."

Spencer v. Brockway, 1 Ohio 259.

"The striking off on motion of pleadings and papers from the files is recognized by Se-. 5126 Rev. Stat. (Now Sec. 11375 G. C.), and is a familiar practice in this state. • • • It seems idle, in this day, when the efforts of lawyers, some

of them at least of the highest class, are being strenuously exerted in the direction of securing a more speedy administration of justice, to talk about a right of a defendant to [fol. 47] stand for months and perhaps years upon a sham defense which will crumble at the first assault upon it when the case is reached. The very statement of the proposition condemns it. It is simply a bold proposition, the effect of which is to obstruct the due administration of justice."

White v. Calhoun et al., 83 O. S. 401.

That this answer was filed solely for the purpose of hindering and delaying the plaintiff in obtaining the relief to which the courts of New York have held he is entitled, is self evident. It should accordingly be stricken from the files and judgment rendered under and in accordance with Section 1 of Article 4 of the Constitution of the United States and the unbroken practice and procedure in the Court of Ohio.

Respectfully submitted, (Signed) Thomas A. Sheridan, Vorys, Sater, Seymour and Peace, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 48] In Court of Common Pleas, Franklin County, Ohio

[Title omitted]

Answer Memorandum of Defendant Contra Motion of Plaintiff—Filed November 14, 1934

The plaintiff has moved that the answer of the defendant be stricken from the files as frivolous and interposed for the purpose of delay.

"A frivolous answer is one that, assuming its contents to be true, contains no valid defense—one which is insufficient on its face, filed for the mere purpose of delay. It is, however, immaterial whether an answer is filed in good faith or for purposes of delay only, if it contains a good defense, or the cross petition states a good cause of action. In such case a motion to strike out should be overruled." 31 O. J., page 896.

"If the answer and cross petition is frivolous and was filed for the purpose of delay merely, as stated in the motion, and all this appears from the pleading itself, the motion was properly sustained; but if the answer contains a good defense, or the cross petition a good cause of action, it is immaterial whether filed in good faith or for purposes of delay only, and the motion should have been overruled. Hamilton, G. & C. Trac. Co. v. Parish, 67 Ohio St. 181 (65 N. E. Rep. 1011; 60 L. R. A. 531)." Black vs. Goodman, 32 O. C. C. 369, at page 370.

True this action is brought upon a judgment purported to have been rendered in a sister state. The prayer of the plaintiff's petition is, "Wherefore, plaintiff asks judgment against the defendant in the sum of * * *". The issue in this case is whether or not the plaintiff, Titus, is entitled to a judgment in this court.

Counsel cite authority at length for the proposition that the adjudication of a sister state is, under the United States [fol. 49] constitution, entitled to full faith and credit in this court. Most certainly that is true. However, it does not mean that in an action on a foreigh judgment the defendant shall have no right to set up a defense. Suppose the judgment has been paid.

Suppose the exemplified copy of the record is a forgery or is in error.

Suppose that the plaintiff does not own the judgment that he has assigned it.

Is the defendant to be barred of his day in court merely because the plaintiff produces an official looking document purporting to be an exemplified copy of a judgment of a court of a sister state? We think not.

Let us look to the answer which the plaintiff describes as being frivolous. We direct the court's attention to the paragraph thereof immediately preceding the prayer. The paragraph is in the nature of a general denial. Hence, under section 11338 of the Ohio General Code, the plaintiff is put upon his proof of jurisdiction of the court rendering the judgment.

Let us now direct the court's attention to the fourth paragraph of this answer, to the allegation that the plaintiff is not the real party in interest. If the plaintiff is not the real party in interest, of course he cannot prosecute the action at bar. The evidence, on the trial of this case, will show that

the plaintiff has assigned all of his interest in the purported judgment on which he bases this action. That is scarcely a frivolous defense.

In the third paragraph of the answer it is alleged that an appeal is pending in the New York courts. We quote from 1915 Ann. Cases, page 1289:

"But though an appeal from a judgment does not in the jurisdiction where it was rendered operate as a supersedeas or stay of proceedings, in an action on the judgment in an- [fol. 50] other jurisdiction it is in the discretion of the court to grant a stay of proceedings or of execution until the appeal is determined."

Is it frivolous for the defendant to plead that appeal? On the contrary the plaintiff's conduct appears to be frivolous in filing the action at bar before the appeal is disposed of in the New York courts.

With reference to the first paragraph of the answer, we beg to submit that upon the final hearing of this case the court will find that the purported judgment is not to be given any faith or credit by this court, for the reason that it is a ridiculous judgment, which is in no way responsive to the pleadings in the case. And in this connection we call attention to what the United States Supreme Court has said about a case of this kind. Judge Brewer in Reynolds vs. Stockton, 140 U. S. 254 at 264, et seq.:

"If the fact of a judgment rendered in a court of one State does not preclude inquiry in the courts of another, as to the jurisdiction of the court rendering the judgment over the person or the subject-matter, it certainly also does not preclude inquiry as to whether the judgment so rendered was so far responsive to the issues tendered by the pleadings as to be a proper exercise of jurisdiction on the part of the court rendering it."

"The invalidity of the judgment depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language is, that a judgment, to be conclusive upon the parties to the litigation, must be responsive to the matters controverted."

The same proposition is restated in numerous authorities and is reaffirmed by the United States court in Hovey vs. Elliott, 167 U. S., 409.

The answer of the defendant states good defenses. If the defense is proven the plaintiff is not entitled to a judgment in this court.

At first examination of this motion of plaintiff we confused the same with a motion to strike on the ground that the answer is a sham:

"A sham answer is one good in form, but false in fact, and not pleaded in good faith, such as an answer denying facts known by the defendant to be true, or intended only for delay." 31 O. J., Page 894.

[fol. 51] "The Ohio supreme court, in defining the power of the trial court in reference to striking of sham answers, has declared that its discretion in such case should be exercised wisely and with discrimination, and that such motion should be sustained only upon such showing upon the part of the plaintiff as leaves no question whatever of the truth and conclusiveness of the plaintiff's evidence. Where there is conflict of evidence upon any material point, or a rational doubt as to the proper order to be made, the motion should be overruled." 31 O. J., page 893, first paragraph.

"2. A proper case is made for the exercise of such power, and for an order striking off such answer, when, upon the hearing of a motion to strike it off, the evidence introduced discloses no conflict upon any material point, and the entire evidence leaves no reasonable doubt that such order should be made." White vs. Calhoun, 83 O. S., 401, second paragraph of syllabus.

In the case at bar there is conflict on every material point of the petition.

The answer sets forth good and meritorious defenses.

The answer is not frivolous. On the contrary the plaintiff is guilty of frivolous conduct in filing and prosecuting this action before the appeal in the New York courts is disposed of.

The plaintiff's motion is not well taken and should be overruled.

Respectfully submitted, (Signed) Butler and Summer,
Attorneys for Defendant.

Copy mailed to counsel for plaintiff 14th of November, 1934.

[File endorsement omitted.]

[fol. 52] In Court of Common Pleas, Franklin County, Ohio

[Title omitted]

Order Overruling Motion to Strike

This cause came on for hearing on the motion of the plaintiff to strike from the files the answer herein and upon the briefs of the parties and the oral statements and arguments of counsel, and the same was submitted to the court, and the court finds that the motion is not well taken and should be overruled.

Wherefore, it is hereby ordered, adjudged and decreed that the motion of the plaintiff to strike from the files the answer herein be and the same is hereby overruled.

To all of the above the plaintiff excepts.

(Signed) Randall, Judge.

26971.

[fol. 53] In Court of Common Pleas, Franklin County, Ohio

[Title omitted]

Motion for Rehearing—Filed February 20, 1935

Plaintiff moves the court for an order granting a rehearing of his motion that the answer filed herein be stricken from the files.

(Signed) Vorys, Sater, Seymour & Pease, Attorneys for Plaintiff.

Memorandum in Support of Motion

Defendant at the oral hearing on plaintiff's motion, produced a photostatic copy of a written instrument which the court considered in passing upon the motion. Plaintiff was not given an opportunity to meet this "evidence." Plaintiff now has evidence which explains and renders valueless the evidence of defendant and should be given an opportunity to present it to the court.

Respectfully submitted, (Signed) Vorys, Sater, Seymour and Pease, Attorneys for Plaintiff.

Copy mailed to Butler & Summers, Attorneys for Defendant.

26971.

[File endorsement omitted.]

[fol. 54] In Common Pleas Court, Franklin County, Ohio

[Title omitted]

Supplementary Memorandum in Support of Motion to Strike Answer

Defendant in his memorandum says:

"Suppose the judgment has been paid. Suppose the exemplified copy of the record is a forgery or is in error. Suppose that the plaintiff does not own the judgment, that he has assigned it."

The defendant well knows that the judgment has not been paid. He well knows that the copy of the record is not a forgery. He also well knows that the plaintiff owns the judgment. Defendant did not allege that the judgment has been paid. Defendant does not allege in his answer that the copy of the record is a forgery. Defendant does not allege that plaintiff does not own the judgment or that he has assigned it. He does allege upon information and belief that the plaintiff is not the real party in interest. This allegation is a legal conclusion and insufficient as against the motion. This contention of the defendant is based upon a recital contained in an affidavit made by the plaintiff. The recital relates to an occurrence on November 23, 1925 and appears on pages 5 and 6 of the affidavit which is filed herewith. We quote:

"I told him at that time that I had already assigned any interest in the proceeds of said action against Lou C. Wallick to Walter L. Titus and Emilie F. Titus."

A photostatic copy of the assignment to Walter L. Titus which was made on March 31, 1934 is attached hereto and [fol. 55] offered in evidence. A photostatic copy of the reassignment, executed December 1, 1925, by Walter L. Titus to the plaintiff is also attached hereto and offered in evidence. Both assignments were made prior to the filing of the action which resul-ed in the judgment sued upon. The assignment of December 1, 1925 vested the legal title to plaintiff's claims against Lou C. Wallick in the plaintiff and made him trustee for part of the proceeds. Section 210 of the Civil Practice Act of the State of New York provides as follows:

"Action to be brought in name of real party in interest. Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, (a person with whom or in whose name a contract is made for the benefit of another), or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted."

The plaintiff's right to bring the action which resulted in the judgment is supported by a line of New York authorities, including Seymour v. Smith, 114 N. Y. 481; Spencer v. Standard C. & M. Corp., 237 N. Y. 479. The plaintiff was unquestionably the real party in interest but even though there was some question on this point, this court cannot inquire into the merits of that question at this time. It is well established that a judgment rendered by a competent court having jurisdiction is conclusive on the merits in the courts of this state when made the basis of an action and the merits cannot be re-investigated. Burnley v. Stephebson, 24 O. S. 474; Pelton v. Platter, 13 Ohio 209; Goodrich v. Jenkins, 6 Ohio 43; Spencer v. Brockway, 1 Ohio 259. A matter of defense which existed anterior to the judgment sued upon cannot be set up as a defense in an action on the judgment. 23 Ohio Jurisprudence, 1345; Stockwell v. Coleman, 10 O. S. 33. Whether the plaintiff was the real party in interest was a question for the New [fol. 56] York Court to decide. It is too late now for the defendant to raise that issue.

There is an allegation in the answer that an appeal has been taken from the judgment. This allegation is insufficient. It is not alleged that an appeal bond was filed. It is not alleged that proceedings on the judgment were stayed or enjoined pending the appeal. It is well established that an action may be maintained on a foreign judgment although it is subject to the contingency of being there reversed or vacated and an appeal does not prevent an action on the judgment if the appeal does not operate as a supersedeas or stay of proceedings in the jurisdiction wherein it was rendered, or if there has not been a compliance with the conditions requisite to obtain the supersedeas. Spencer v. Barnes, 132 Pac. 707; Annotated Cases 1915 a Note, page 1289 and cases cited.

Defendant quotes from an authority to the effect that it is within the discretion of the court to grant a stay of proceedings or of execution until the appeal is determined. In this case there has been no application for a stay of proceedings.

Another alleged defense is that the judgment was not responsive to the issues. An examination of the amended complaint and the amended answer as set forth in the copy of the record will establish to the satisfaction of the court that the judgment is responsive to the issues and the defendant cannot go beyond the record. The answer does not question the jurisdiction of the court over the subject-matter. If the defendant, by claiming that the judgment was not responsive to the issues, means that the judgment was erroneous, this, of course, cannot be a defense. Sipes [fol. 57] v. Whitney, 20 O. S. 69. Defendant cites the case of Reynolds v. Stockton, 140 U. S. 254. This case is not an authority governing the situation before the court. In the Stockton case the judgment was rendered on an entirely different cause of action than that set up in the petition. A suit was filed in New York to suggest a fund of $100,000.00 in the hands of the Superintendent of Insurance to satisfy plaintiffs' claims against a New York insurance company. A New Jersey insurance company had taken over the assets of the New York company and then failed. The New Jersey company and the receiver of the New Jersey company were made parties defendant and filed answers but did not appear further and were not present at the time of trial and judgment. A personal judgment was rendered against the New Jersey company and the receiver for $1,000,000.00. The United States Supreme Court very properly held that the judgment was not valid. In the case before the court the record clearly shows that the judgment was a valid one, faithfully responsive to the issues in the case.

The complaint set up a cause of action for wrongful appropriation of plaintiff's property which consisted of certain shares of stock. The prayer was for a return of the property and an accounting of dividends received by defendant on the stock and a judgment for the money found to be due plaintiff. An answer was filed. The suit was contested. A trial was had and resulted in a judgment for the defendant. This judgment was reversed by the Appellate Division of the Supreme Court and an interlocutory judgment granted plaintiff. The Appellate Court decreed that

plaintiff, Titus, was the owner of the stock and that he was entitled to the issues, profits and dividends. The defendant appealed from the judgment of the Appellate Court to the [fol. 58] Court of Appeals and the Court of Appeals affirmed the judgment of the Appellate Division. Pursuant to the order of the Appellate Division, an accounting was had and the amount found due to plaintiff from the defendant was determined. The judgment sued upon here was rendered upon the finding. An inspection of the amended complaint and the amended answer as they appear in the record will disclose that the judgment was responsive to the issues and no evidence has been submitted to the contrary.

The allegation there is nothing due to the plaintiff from defendant is a legal conclusion and insufficient as against the motion.

Respectfully submitted, (Signed) Vorys, Sater, Seymour & Pease, Attorneys for Plaintiff.

[fol. 59] In Common Pleas Court, Franklin County, Ohio

[Title omitted]

Answer Memorandum of Defendant Contra Plaintiff's "Supplementary Memorandum in Support of Motion to Strike Answer"—Filed March 19, 1935

After the defendant filed his answer herein the plaintiff filed a motion and supporting memorandum to strike defendant's answer from the files on the ground that the answer is frivolous and interposed solely for the purpose of delay.

We filed an answer memorandum to that motion and then counsel for plaintiff arranged for an oral hearing and the court overruled the motion. An entry overruling the motion was approved and filed November 23, 1934. Now the plaintiff files a supplementary memorandum with some exhibits, which we understand counsel intends as a motion for rehearing.

No new issue or new matter is presented by this motion for rehearing. Consequently, we refer the court to our original answer memorandum for a discussion of the authorities relied upon by the defendant.

A frivolous answer is one which on its face contains no valid defense. The answer at bar contains on its face several valid defenses. The general denial is on its face a valid defense. Whether or not the answer is filed for purpose of delay is of no consequence in considering whether or not the answer is frivolous. Hence, plaintiff's claim, at [fol. 60] the outset must fail.

However, if plaintiff means to claim that the answer is a sham (which is not the substance of plaintiff's motion) the rule is that a case is made for application of the power of the court to strike when upon hearing on the motion to strike the evidence discloses no conflict upon any material point, and the entire evidence leaves no reasonable doubt that the answer should be stricken. 83 O. S. 401 cited in our answer brief.

In the case at bar there is conflict on every material point.

The paragraph immediately preceding the prayer is a general denial. Under Section 11,338 of the Ohio General Code the plaintiff is properly put upon his proof of jurisdiction of the court rendering the judgment.

The fourth paragraph of the answer alleges that the plaintiff is not the real party in interest. At the oral hearing the defendant produced photostatic copies of a proceedings started in the Supreme Court of the State of New York, County of New York, on a date subsequent to the date the petition was filed in the case at bar. That New York proceedings is by London I. Wallick, plaintiff, against Edward H. Titus, defendant. The defendant in that case is the plaintiff in the case at bar. London I. Wallick in that proceedings is claiming that he had an agreement with Edward H. Titus whereby London I. Wallick was to have an interest in the proceeds of any judgment procured by Edward H. Titus in the case of Edward H. Titus against L. C. Wallick (the case in which the pleaded judgment at bar was allegedly procured). On September 7, 1934 Edward H. Titus, plaintiff in the case at bar filed an affidavit in that proceedings in New York brought by London I. Wallick (a photostatic copy thereof was offered at the oral hearing on plaintiff's motion at bar). In that affidavit Edward H. Titus swore as follows:

"The plaintiff's application for an injunction pendente [fol. 61] lite should be denied. Prior to my execution of the instrument of November 23, 1925, I assigned my in-

terest in my claim against Lou C. Wallick to Walter L. Titus, my brother, and Emilie F. Titus, my wife. The plaintiff herein knew of this assignment before the instrument of November 23, 1925 was executed. It is respectfully submitted that it does not lie within the jurisdiction of this court to now enjoin what has already been accomplished."

Counsel in the case at bar now offer a photostatic copy of a reassignment to Edward H. Titus of this claimed judgment. However, on September 7, 1934 Titus in his affidavit in connection with the London I. Wallick claims says nothing about any reassignment but claims that he now has no interest in the judgment and that the claims upon which the judgment arose had all been assigned to his brother and to his wife. Counsel says that it is too late now for defendant to raise this issue. The obvious answer to that is that the defendant at bar has never known until recently by the appearance of the aforesaid affidavit by Edward H. Titus, that Edward H. Titus has assigned away all of his interest, if any, in the action. Counsel cite some New York statutory law on the question of real party in interest. Whether or not that is the New York law we do not know. In the first place it would need to be proven and in the second place the Ohio real party in interest statute is procedural and we submit that it is an elementary proposition of the law of conflicts that as to procedure the law of the forum applies.

The court will keep in mind that this matter is not before the court on a motion calling for the application of extraordinary powers of this court, to summarily strike from the files the answer of the defendant and prevent him from having a full hearing on the issues. According to 83 O. S. 401 there must be no reasonable doubt in the court's mind after the entire evidence is in on the motion.

As to the defense that the plaintiff is not the real party in interest it would appear by the exhibits attached to the supplemental memorandum of the defendant and by the photostatic copies of affidavits presented by the defendant at the oral hearing, that the plaintiff, with advice of counsel, has been juggling the legal title and equitable interests of [fol. 62] these alleged claims against Lou C. Wallick to suit the convenience of Edward H. Titus in defrauding his creditors and his arch conspirator, London I. Wallick. If Edward H. Titus has, by his iniquitous machinations found

himself in an embar-assing position he has no one to blame but himself and the fact alone that he is not the real party in interest will justify this court in dismissing the petition at bar without going into the merits of the remaining defenses.

With reference to the first paragraph of the answer we submit that upon final hearing of this case, if it is necessary to consider the defense incorporated in said first paragraph the court will find that the purported judgment is one not to be given any faith or credit by this court. Upon a complete examination of the pleadings and the record in the case, including the findings and recommendations of referees, it will clearly appear that there is no foundation or jurisdiction whatever for that part of the judgment which purports to render a personal judgment for money against Lou C. Wallick. The action, as counsel states, was for a return of the property, to-wit: stock in the Secor Hotel Company and an accounting of dividends received by the defendant on the stock. The record will show that no dividends had ever been received by the defendant on the stock. The record will show that the Secor Hotel Company was not a party to the action and that in spite of those facts the referee and court went into facts concerning the payment of salaries and expense moneys by the Secor Hotel Company to Lou C. Wallick over a long period of years and attempted to render judgment in favor of Edward H. Titus, a claimed stockholder, on the basis that Lou C. Wallick as an officer and agent of the Secor Hotel Company had been paid by the company excessive sums of money for salary and expenses. If Lou C. Wallick has obtained excessive sums of money from the Secor Hotel Company, as above described, the action to recover the same lies only in the Hotel Company for the benefit of creditors and stock-[fols. 63-64] holders, and if the Secor Hotel Company should be successful in such an action the moneys recovered would first be for the benefit of the creditors of the Secor Hotel Company and if anything were left over after payment of creditors then the stockholders would participate. A short cut attempted to be taken by the New York court in this action, without considering the Secor Hotel Company, its creditors and other stockholders, is without principle and without precedent. And on the authority of the Supreme Court of the United States, we submit that the purported

judgment is not responsive to the issues tendered and tried in the New York court.

In the third paragraph of the answer it is alleged that an appeal is pending in the New York courts. Counsel charges that we have not asked for a stay of proceedings pending that appeal. We submit that our objection to the present motion is sufficient prayer for a stay of proceedings. If on the pending appeal the lower court is reversed, then all of the issues in the case at bar will have been decided.

We again call attention to the authorities cited in our original answer brief.

We respectfully submit that the answer is not frivolous because on its face it contains valid defenses. We submit that the court cannot hold that the answer is a sham. On the evidence submitted is there no conflict upon any material point? Is no reasonable doubt left in the mind of the court? The court properly decided this motion upon oral hearing and should adhere to his original opinion.

Respectfully submitted, (Signed) Butler and Summer, Attorneys for Deferdant.

Copy mailed to counsel for plaintiff, March 19, 1935.

26971.

[File endorsement omitted.]

[fols. 65-67] In Common Pleas Court, Franklin County, Ohio

[Title omitted]

Order Denying Motion for Rehearing—Filed April 29, 1935

This cause came on for hearing on the motion of the plaintiff for a rehearing of plaintiff's motion requesting that the answer of the defendant be stricken from the files, on the evidence and briefs of counsel and was submitted to the court, and the court upon consideration of the same finds that said motion for rehearing is not well taken and should be denied.

Wherefore, it is hereby ordered and decreed that the motion of the plaintiff for a rehearing of his motion requesting that the answer of the defendant be stricken from the files be and the same is hereby denied and overruled.

To all of the above findings and order the plaintiff excepts.

(Signed) Randall, Judge.

[File endorsement omitted.]

[fol. 68] In Court of Common Pleas, Franklin County, Ohio

[Title omitted]

Order re Amended Answer—Filed October 17, 1935

Upon good cause shown defendant is hereby given leave to file instanter his Amended Answer with Interrogatories annexed: Plaintiff given leave to filed his reply on or before Oct. 31, 1935.

——, Judge.

[fol. 69] In Court of Common Pleas, Franklin County, Ohio

[Title omitted]

Amended Answer

For his answer to the petition filed herein the defendant says that the alleged judgment described in the petition, so far as it purports to be a personal judgment for money, is not a judgment which is to be given any faith or credit in this court, for the reason that said supposed judgment is in no way responsive to the issues tendered by the pleadings in the case in which said supposed judgment is alleged to have been rendered, and is in no way responsive to the matters, which were actually controverted in said case.

Further answering the defendant says that there is nothing due to the plaintiff from the defendant on said supposed judgment.

Further answering the defendant says that the plaintiff is not the real party in interest in this action.

Further answering the defendant says that said purported judgment was procured through fraud practiced upon the New York courts and upon the defendant in that at the institution of the suit in which the plaintiff claims to have recovered said purported judgment and at all times during the litigation of said suit the plaintiff was not the real party in interest and did not own the alleged claims against the defendant and had no right to prosecute suit on the same in his name, although the plaintiff throughout said litigation represented to the courts and to the defendant that no one other than himself had any interest in the suit and the plaintiff suppressed the fact that a person or persons other than himself owned said alleged claims and were the real parties in interest in whose name or names alone the suit could be rightfully prosecuted.

[fols. 70-71] Further answering the defendant denies each and every allegation in the petition contained not herein specifically admitted to be true.

Wherefore, the defendant prays that he may go hence without day and have his costs herein.

(Signed) Butler and Summer, Attorneys for Defendant.

Duly sworn to by Lou C. Wallick. Jurat omitted in printing.

[fol. 72] In Court of Common Pleas, Franklin County, Ohio

[Title omitted]

Order re Amendment to Amended Answer—Filed November 8, 1935

Upon good cause shown, the defendant is hereby given leave to file an amendment to his amended answer instanter.

(Signed) Charles A. Leach, Judge.

[File endorsement omitted.]

[fols. 73-77] In Court of Common Pleas, Franklin County, Ohio

[Title omitted]

Amendment to Amended Answer—Filed November 8, 1935

The defendant says that the following Section 210 of the Civil Practice Act of the State of New York was a duly

enacted statute and law of said State in force at the institution of and continuing in force during the prosecution and pendency of the litigation in which plaintiff claims to have recovered the purported judgment set forth in the petition:

Section 210. Civil Practice Act.—Action to be brought in name of real party in interest. Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, a person with whom or in whose name a contract is made, for the benefit of another, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted.

(Signed) Butler and Summer, Attorneys for Defendant.

Duly sworn to by Lou C. Wallick. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 78] In Court of Common Pleas, Franklin County, Ohio

[Title omitted]

Answers to Interrogatories—Filed December 7, 1935

The plaintiff, Edward H. Titus, with respect to interrogatory designated "1" submitted with the amended answer of the defendant herein, setting forth the following: "1. Did not the plaintiff in the trial of the case in which the judgment in question was rendered, testify in effect that no one other than himself was interested in the subject matter of the litigation of said case?" makes answer as follows: No.

The plaintiff, with respect to interrogatory designated "2" submitted with the amended answer of the defendant herein, setting forth the following "2. If the answer to question number 1 is in the negative, then state what the plaintiff did there testify as to his interest and the interest of others in the subject of litigation of said case." makes answer as follows: In the trial of the case in which the judgment in question was rendered, I testified that London Wallick had no interest in the case. I testified further, that I

had an agreement with my brother, which has always been a matter between us, that there was an assignment to my brother, and in response to the question: "And after your brother got through receiving certain expenses under the assignment, your wife was to get the balance?" I gave the following answer: "No."

[fols. 79-85] (Signed) Edward H. Titus.

Sworn to before me this 15th day of November, 1935.
Jerome V. Deevy, Notary Public, Bronx County.
Commission expires March 30, 1937. (Seal.)

Clerk's certificate to notary public omitted in printing.

[File endorsement omitted.]

[fol. 86] In Common Pleas Court of Franklin County, Ohio

[Title omitted]

Reply—Filed January 14, 1936

Plaintiff for reply to the Amended Answer of defendant admits that the statute designated as Section 210 of the Civil Practice Act of the State of New York and set forth in the Amendment to Amended Answer was a duly enacted statute and law of the State of New York in force at the institution of and continuing in force during the prosecution and pendency of the litigation in which plaintiff recovered the judgment set forth in the petition filed herein.

Plaintiff denies each and every allegation contained in defendant's amended answer, not herein specifically admitted to be true.

Further answering plaintiff says that all of the defenses pleaded in and issues raised by said amended answer were raised by the pleadings and evidence in the action in which plaintiff recovered the judgment sued upon in this action, and were fully considered and adjudicated therein; that said action was between the same parties and that final judgment was rendered therein by a court of competent jurisdiction.

[fols. 87-88] Wherefore, plaintiff prays that the said amended answer be dismissed and that he be granted the relief prayed for in his petition.

(Signed) Vorys, Sater, Seymour & Pease, Attorneys for Plaintiff.

Duly sworn to by Byron E. Ford. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 89] In Court of Common Pleas, Franklin County, Ohio

No. 143,633. 26971

Edward H. Titus, Plaintiff,

vs.

Lou C. Wallick, Defendant

Bill of Exceptions—Filed December 18, 1936

Present:

Messrs. Ford & Rankin (Columbus) and Messrs. Thomas A. Sheridan, Lewis F. Glaser and Aaron Frank (New York) on behalf of the Plaintiff;

Messrs. Butler & Summer on behalf of the Defendant.

Be it Remembered, That on the trial of the above entitled cause at the January Term, A. D. 1936, of the Court of Common Pleas of Franklin County, Ohio, before Hon. Charles A. Leach, Judge, a jury having been waived by agreement of the parties hereto, the plaintiff, to maintain the issues on his part to be maintained, introduced and offered in testimony on his behalf, the following evidence, to wit:

Monday Morning Session,
January 20th, 1936.

Colloquy

The Court: You may proceed.

Mr. Ford: If the Court please, this action, Edward H. Titus against Lou C. Wallick, is an action on a judgment

given by the Supreme Court of the County of New York for the State of New York. The judgment was rendered by that court on the first day of May, 1934, in favor of the plaintiff in this action, Edward H. Titus, against Lou C. [fol. 90] Wallick, the defendant in this action. The amount of the judgment rendered was $389,103.21. This judgment is the result of approximately ten years of litigation in the state of New York. The original action was filed in December of 1925, and ended on May 1st, 1935, when the appeal from the judgment was affirmed.

The Court: There was an appeal from the judgment?

Mr. Ford: Yes. The time for further appeal, at least, has expired, and the judgment is now for that. I think there is no question but what the court is a court of general jurisdiction, and no part of the judgment paid, and there is due the plaintiff the full amount of the judgment plus interest from the date it was rendered.

The Court: Mr. Summer.

Mr. Summer: If the Court please, just to correct one of the statements there, I think counsel will agree that at the time this action was filed here in Franklin County no appeal had been determined in New York at that time, but that after this action had been filed here in Franklin County the appealate division, not the court of last resort in New York, but the appel-ate division of the Supreme Court affirmed this judgment which was rendered by the Supreme Court.

Mr. Ford: If I am not mistaken, however, at the time the suit was filed no appeal had been taken.

Mr. Summer: That is right.

Mr. Ford: And the judgment, of course, is a final judgment. The mere fact that the time for appeal was not over——

Mr. Summer: I do not want to admit that an appeal had not been taken at the time this suit was brought here in Franklin County. I do not know that that is important, but I think the appeal had been taken at that time.

[fol. 91] Now, if the Court please, we have filed an amended answer; I don't know whether the Court has examined that or not.

The Court: I have not.

Mr. Summer: I should like to read it at this time (reading same).

We claim that the plaintiff, coming down to this action in Franklin County, is not the real party in interest, and the evidence will show this; what we mean when we say that the judgment in New York was not responsive to the pleadings, not responsive to the issues tendered by the pleadings, is that in the case in New York the plaintiff was asking for one thing, and when he could not procure that, then he procured something else, to which he was not entitled on the pleadings, or the issues tendered by the pleadings or the matters controverted. The evidence will show that the action in New York was primarily for recovery by the plaintiff o 250 shares of the common stock of the Secor Hotel Company at Toledo, Ohio, that representing a one-fourth interest in that company. In addition to that the plaintiff was asking for an accounting of dividends or other sums received by the defendant, Mr. Wallick, on account of his holding these 250 shares of stock which Titus, the plaintiff, claims as his. So that the primary action here——

The Court: Were those questions raised on the appeal?

Mr. Summer: They were raised on an appeal from the First Referee's report, objected to and were denied relief on the ground that we were asking relief for——

The Court: Pardon me; the matters you suggested here, that the relief secured was not responsive to the prayer and allegations of the petition, you did not prevail in the Supreme Court, evidently, on that question or, of course, there could have been no appeal.

[fol. 92] Mr. Summer: We did not prevail in the Supreme Court on that question, and did not prevail in the Appellate Division of the Supreme Court.

The Court: Was there a proceeding from the Appellate Division?

Mr. Summer: Not on that question.

The Court: Was it taken to such an appeal?

Mr. Summer: I don't think it was at that time.

The Court: Somewhere along the line was it not open to final determination by the highest court, or what was the situation in that regard?

Mr. Summer: The appeal, probably, could have been taken to the Court of Appeals on this question, but it was not. The time for that has expired.

The Court: Can this court in any way enter into the discussion or investigation on that subject matter, since the

Federal statutes provide for full faith and credit for judgments in another state?

Mr. Summer: We think this court surely can, and we rely on a number of authorities, including a decision by the Supreme Court of the United States.

The Court: That is the question that I take it is here.

Mr. Summer: That is one question. We have those authorities but I do not believe the Court wants to here them at this time.

The Court: No.

Mr. Summer: So, as I have said, the primary action down in New York was for the recovery of those 250 shares, and then an accounting. And the Court found the plaintiff was the owner of these 250 shares, and then he was asking for an account of dividends or other sums which the defendant received on account of the holding of those shares. Now the Referee found—of course, this accounting was referred to a Referee, and the record will show,—the records in New York which we expect to offer here—the record will show that [fol. 93] the Referee found that there were no dividends or other monies received by the defendant on account of the defendant owning this stock. But regardless of that fact, the Referee found that the defendant had misappropriated something in excess of a million dollars of the Secor Hotel Company funds, and without the Secor Hotel Company being a party to the action, the Referee virtually allocated to Titus a one-fourth amount of that misappropriation, regardless of the fact that neither stockholders nor creditors were represented. And this judgment was rendered from that figure.

Let us look at the items which the Referee considered in making these findings, and these are the items which the evidence will show here. The Secor Hotel Company had acquired over 5000 shares of the preferred stock down at Providence, Rhode Island, and a consideration of $526,000.00 was paid by the Secor Hotel Company for that stock, and the stock was turned over to the Secor Hotel Company. The stock was originally taken in the name of Lou C. Wallick. The Referee down in New York, without the Secor Hotel Company being before him, without the Secor Hotel Company being a party to this proceeding, that that was wrongful, the corporation had no right to do that; that that constituted a misappropriation of funds by Lou C. Wallick, and

proceeded to set that aside and say that we will throw this into the pot here out of which Titus, the plaintiff, is to have one-fourth. Then the Referee in his finding determined that $75,000.00 in salary which had been paid to Lou Wallick by the Secor Hotel Company over a period of several years, was wrongful; that he was not entitled to any salary for those years, so that he would throw that into this pot out of which he is going to give Titus one-fourth, without the Secor Hotel Company being a party to that proceeding. Then the Referee found that $24,186.67 had been improperly paid to Duane Wallick, the son of Lou C. Wallick, and the Referee found that that had been a misappropriation by [fol. 94] Lou C. Wallick, and he threw that into the pot: and the Referee found that there was $19,034.54 of taxes paid by the Secor Hotel Company for the Deshler Hotel Company of Columbus, Ohio, and the Referee says "That is wrong, and we will charge that up to Lou C. Wallick",—believe it or not. And the Deshler Hotel Company, of course, was not a party to the proceeding. So regardless of the fact that if the claim was true, that those taxes were paid for the Deshler Hotel Company, that the Deshler Hotel Company would be liable in an action by the Secor Hotel Company for the recovery of that amount. And likewise the Referee found that a bond premium of $933.94 had been paid by the Secor Hotel Company for the benefit of the Deshler Hotel Company in connection with some extension for filing tax returns, and the Referee says "We will put that in the pot against Lou C. Wallick. Then the Referee proceeded to find that the Secor Hotel Company had paid some personal expense of Lou C. Wallick and said that was wrongful in the extent of $8,002.79, and he charged that up to the defendant. The Referee took all those sums and added them up and said Titus is entitled to one-fourth of that amount in an accounting against Lou C. Wallick, and it does not make any difference that the Secor Hotel Company, or any other parties that might be interested, were not parties to this proceeding. And it was from that finding that this judgment upon which suit is brought was rendered.

We claim that no such finding, no such action could be maintained without the Secor Hotel Company being a party defendant; the action here and the action in New York was for the recovery of 250 shares of stock and an accounting for dividends, and I do not think that they can make any-

thing more out of that action. If they claim anything more for that action——

The Court: This court here cannot sit as a court of review of the state court of New York. The judgment is either a valid judgment or it is invalid, and that is just about as far as you can go, isn't it?

[fol. 95] Mr. Summer: Well, that is right. The point I am making, and the point is well taken, I submit, that those facts which I have just related show that the judgment rendered down in New York was not responsive to the pleadings. In other words, the petitioner down there was asking for one thing, recovery of stock and accounting of dividends, but he got something else. He got a finding that the defendant, Lou C. Wallick, had made misappropriation of over a million dollars in funds, and on that kind of an action the Secor Hotel Company was a necessary and indispensable party.

The Court: Why was that case not taken to the court of last resort in the state?

Mr. Summer: One reason why it was not taken to the court of last resort is because this action was pending here in Franklin County. The petition had been filed out here in Franklin County and the defendant is living here and we felt it could be as easily attacked here in Franklin county as it could be in New York. But regardless of that fact, we submit that the authorities will bear out the proposition that if the judgment here is not responsive to the issues as tendered and as to the matters controverted, that the judgment is entitled to no faith or credit, regardless of whether any appeal was taken or not, Your Honor.

Summing up what I have said, we contend that the evidence will show that plaintiff in New York brought one kind of an action and he was given judgment on an entirely different action, which was not pleaded.

Now we think that the evidence will further show that the plaintiff here is not the real party in interest in this action prosecuted in Franklin County. Third, we say in the answer that the judgment in New York was procured through fraud perpetrated upon the Court, in that the plaintiff in that action in New York was at no time the real party in interest; [fol. 96] that the New York states provide that the action must be prosecuted in the name of the real party in inter-

ent; that the plaintiff concealed that fact and suppressed that evidence and therefore, on account of that fraud, this court should give no faith or credit to that judgment.

I believe that is all, Your Honor.

Mr. Ford: If the Court please, I will ask Senator Sheridan to make a reply statement, because he is more familiar with the entire situation than I am.

Senator Sheridan: If Your Honor please, I tried this case in the Supreme Court of New York County. The case lasted for about eight days; it was an action in equity. The title of it was Edward H. Titus against Lou C. Wallick. Briefly, the basis of our claim was for the return of 250 shares of the common stock of the Secor Hotel Company. The capital structure consisted of 1000 shares; that Mr. Titus, we claim, was entitled to one-fourth of that stock, and an accounting of the income, profits, and so forth.

The Court: The first part of the claim being that he was the owner of 250 shares.

Senator Sheridan: Yes. That case was tried, and appeal was taken, and defendant was represented by probably one of the outstanding firms of New York, Olvany, Eisner & Donnelly. It was closely contested litigation, which went to the Appellate Division, the Appellate Division of five judges, who heard that case on the authorities and record. If Your Honor will glance over to the left, you will see some of the record and briefs. The very point that counsel raises was raised in the Appellate Division.

The Court: Let me ask, is there an opinion by the Appellate Division?

Senator Sheridan: Not by the Appellate Division. If Your Honor will indulge me for a moment I will show the points. In the Appellate Division, of course, counsel for [fol. 97] the defendant took this attack in the trial of the case, judgment is confined solely or was relief solely to the corporate entity, the Secor Hotel Company. Mind you, that hotel had gone out of existence in 1928. This hotel arrangement was owned by Lou Wallick, a one-fourth interest or a certain interest, his brother London a certain interest; between those two men they had 750 shares and Mr. Edward Titus 250 shares, of which he had documentary proof. They lulled him into a state of security over a number of years. Finally, when he made his demand,—prior to that he had been asked to deed over by an assignment prepared on this

basis, that he had transferred his 250 shares to one Elmer Davis, an attorney and secretary of that corporation, and never received a dollars, and he was stripped of his proof. He finally got that proof and he went into the Supreme Court and asked for the return of that stock and for an accounting. Now the attorneys said you cannot pierce the corporate veil; your judgment is solely against the Secor Hotel Company. Mr. Lou Wallick had taken or purchased the stock of his brother London Wallick. That was a corporate alliance of themselves and attorney and they made a bond of that stock so that he had it all for a period of twenty years, and he invested that money for a hotel. He put $550,000.00 in Providence, and Baltimore where his son has held forth for years. He had his salary and their salary charged to the Deshler Hotel of this city when his brother, who was not entitled to one jot or tittle, was not here in the town.

Now in 1928 his attorneys brought this very same question to the Appellate Court, and I have submitted here an affidavit wherein that raised it. Mr. Donnelly says specifically that under that 7-A. The Appellate Division ordered, adjudged and decreed that the defendant, Lou C. Wallick, account to the plaintiff, adjudging all benefits, profits, earnings and income, together with interest from the respective dates when such profits, income or earnings [fol. 98] accrued. They have already become indebted by reason of his one-fourth interest in and to property from earnings and income of said corporation since October 27, 1928. And it was further ordered, adjudged and decreed that an accounting be taken of the earnings of the Secor Hotel Company and of any successor thereof subsequent to October 27, 1908, and all sums that have been received by the defendant as dividends or otherwise—as dividends or otherwise, and particularly with respect to the monies applicable to the plaintiff's said shares of stock, and account. That was in 1928. They took an appeal to the Court of Appeals. I argued that case in the Court of Appeals before the full bench of the judges, Judge Cardoza presiding Judge, and he affirmed that judgment, and Mr. Lou Wallick was in that court and listened to the arguments. It was then sent back and we made a motion under our practice, for the appointment of a receiver. It went before a young man who had not very much experience, and under the persuasive influence of

Mr. Donnelly he said "Well, you got this judgment after your trip through the courts, but you cannot penetrate the corporate veil". Then delays for months; they would not move either way. It has been delay throughout this case. We finally made a motion before Judge Untermyer to set aside that report. They contested that motion, and we went to the Appellate Division. I argued the case there before five of our judges. Judge Untermyer's decision was right, and then the Appellate Division did something that has not been done for years, they appointed a former judge to make an end to this litigation, and Judge Mahoney sat in this case and took the testimony. He found that Mr. Lou Wallick had defrauded the sum of three hundred and some odd thousand dollars that rightfully belonged to our client. They then delayed for almost one year the litigation. They repeated- asked for time. We had finally to make a motion to dismiss their appeal, and their attorney came in and said [fol. 99] that if they got sixty days more we could dispose of it, and briefly stated, it was fourteen months after Judge Mohaney gave his decision that they finally argued it in the Appellate Division and this judgment was affirmed. So we have this situation, that now after possibly eight or ten years of litigation, where the parties were before the jurisdiction of the court, where they never questioned it and the questions that they raised before our Appellate Court determined even in 1928, when this case was affirmed in 1931, given this broad measure of relief, they never raised it before the Court of Appeals, and when the counsel says they did not appeal to the Court of Appeals, we have no answer to that. Why didn't they do it? We say that this judgment obtained in the state of New York, where they have appeared, where service was properly affected, where the jurisdiction was proper and where they were represented, that when we come to the state of Ohio these questions that have been raised, with all due respect to any judge of this state, if we are to follow the command of the constitution of our country to give full faith and credit to a judgment of a sister state, that this judgment is entitled to credit.

Now I have done.

Mr. Ford: The claim of the defendant that all of the issues raised by the defense has been raised and adjudicated in New York in the court there.

Mr. Summer: I would like to have just a few minutes to discuss one matter here and then I do not think I will say

any more about it during the trial. Senator Sheridan talks about fraud here and robbery. You knew this stock of 250 shares which had been awarded by the New York court to Titus was assigned to him in 1908 under an arrangement that Mr. Wallick claimed and put in the hands of Mr. Titus the power to force himself on the Board of Directors of the Secor Hotel Company, the Secor Hotel Company at that [fol. 100] time owing Lord & Taylor of New York a large sum of money, and Titus was treasurer of Lord & Taylor, and in 1911 when the Secor Hotel Company paid off the balance owing to Lord & Taylor, Titus turned over this stock to Lou C. Wallick, or to Mr. Davis, attorney for Mr. Lou C. Wallick, and then gave Davis an assignment of the stock. If the Court please, it went along a few years, Wallick believing he was the owner of the stock until 1925 Titus, who was then and had been for years in financial straits, brought this suit to recover 250 shares of stock on what? On an oral promise which he claimed was made back in 1906, two years before the Secor Hotel Compa y was incorporated; that the consideration for the promise was Titus going on an indemnity agreement in connection with a lease in order to procure a bond for the loan and no liability ever incurred under the bond, because the new lease was executed, and Titus knew that. Now Mr. Sheridan says that there was documentary proof. Well the decision of the court will show that they cannot decide this on a document; that they must rely on the statements of the witnesses, and both trial judges who had the witnesses before them and who had Titus and Wallick before them and heard the cases, both trial judges found for defendant, and it went up to the appellate Division and the Appellate Division then on the cold and inanimate record found the other way in both instances. And the reason for two trials was this Senator thinks Mr. Wallick is a thief, and a robber, and his client an angel. The reason for the second trial was this, in the first trial Titus was examined about some deal which he made up along with London Wallick, the estranged brother of Lou Wallick before that litigation started; Lou Wallick had gotten into his possession a letter between Titus and London Wallick where they talk about interest being assigned. But I do want the Court to know there are two sides to this question.

The Court: Then this comes back to who in equity and good [fol. 101] faith was the true owner of the 250 shares of stock.

Mr. Summer: No, it does not. A great deal that has been said here I do not think has anything to do with this at all, but I did not want to let this statement go unchallenged, because the plaintiff, Titus, suppressed evidence in the first trial. And now they talk about fair dealing.

Monday Morning Session,
January 20th, 1936.

Mr. Ford: Before we start, Your Honor, we made a motion to strike the answer, which was overruled. We would like at this time for the purposes of the record at least, to renew that motion, and also to move the Court for an order striking from the record the amended answer of the defendant, for the reason that it is a sham answer.

The Court: You say that has already been passed upon by some branch of this court?

Mr. Ford: The original motion to strike the answer was passed upon, yes.

The Court: Well, I don't know anything about it. I cannot very well make a ruling now before I see what the other court did.

Mr. Summer: Judge Randall ruled on that particular issue.

Mr. Ford: Judge Randall ruled, but for the purposes of the record I would like to renew that motion and save my record.

The Court: All right; I shall overrule the motion at this time, and note your exception.

Mr. Ford: And that includes the motion to strike the amended answer?

The Court: Yes.

Mr. Ford: Save our exceptions.

[fol. 102] Mr. Ford: At this time we would also like to move for a judgment in favor of the plaintiff on the pleadings and statement of counsel.

The Court: That will likewise be overruled at this time.

Mr. Ford: Save our exception.

Mr. Ford: I take it, Mr. Summer, there is no question about the identity of the parties?

Mr. Summer: What do you mean by that?

Mr. Ford: The parties in the action in New York and the parties in this action are the same parties.

Mr. Summer: No, no question about that.

And thereupon, a paper writing attached to the petition is marked for purposes of identification as Exhibit A.

Mr. Ford: There is also no question but that no part of that judgment has been paid?

Mr. Summer: No.

And thereupon, paper writings are marked for purposes of identification herein as Exhibits B and C.

Mr. Ford: I take it you have examined Exhibit A?

Mr. Summer: I have seen a copy; I have not examined the original.

The defendant is willing that the documents attached to the petition which are referred to in the petition as a certified copy of the transcript may be admitted. Of course, we are not admitting that the judgment is a valid judgment, but merely no objection to this document being admitted in evidence.

The Court: That they are genuine exemplified copies of what they purport to be?

Mr. Summer: That is right.

[fol. 103] Mr. Ford: For the purpose of identification, Plaintiff's Exhibit A is an exemplified copy of the judgment obtained in the Supreme Court of the County of New York and State of New York. It includes the copy of the summons, copy of the plaintiff's amended complaint, copy of the second amended answer, document entitled Exhibit A, transfer of stock, the order of the Supreme Court of the County of New York, State of New York, Borough of Manhattan, Hon. Edward J. McGoldrick, Justice, and the certificate of Albert Marinelle, Clerk, and the seal of the court, and the certificate of John L. Walsh, Justice of the Supreme Court certifying that the seal affixed to the exemplification of the Clerk is the seal of the Supreme Court, and the attestation thereof is in due form. We offer this in evidence at this time, Your Honor.

The Court: I understand there is no objection and it may be admitted.

And thereupon, the paper writings last above referred to, marked Exhibit A, are admitted in evidence on behalf of the Plaintiff and are hereto attached and made a part hereof.

Mr. Ford: For the purpose of identification, Exhibit B is exemplified copy of order of affirmance or appeal from

the judgment, this order made on the 24th day of May, 1935, by the Supreme Court of the County of New York, State of New York, Appellate Division. This exhibit also contains a judgment entered upon the order of affirmance, and the judgment is dated June 5, 1935.

Exhibit C is exemplified copy of a judgment entered July 25, 1932, on the affirmance by the Court of Appeals of the State of New York, the order having been entered on July 22, 1932, by the Court of Appeals.

[fol. 104] If the Court please, we would like to offer Exhibits B and C in evidence.

Mr. Summer: No objection.

The Court: They may be admitted.

And thereupon, the paper writings last above referred to are admitted in evidence on behalf of the Plaintiff, and are hereto attached, marked Exhibits B and C respectively, and made a part hereof.

Mr. Ford: Plaintiff rests, Your Honor.

And thereupon, the plaintiff rested.

And, Be it further remembered, that the defendant to maintain the issues on his part to be maintained, introduced and offered in testimony on his behalf, the following evidence, towit:

Mr. Summer: Now the papers on appeal, defendant's exhibit one, defendant's exhibit two, defendant's exhibit three, defendant's exhibit four, and defendant's exhibit five.

And thereupon, certain volumes were marked for identification herein as above noted.

And thereupon, a paper writing is marked for purposes of identification herein as Defendant's Exhibit No. 6.

Mr. Summer: Now, if the Court please, at this time we want to offer in evidence documents which have been marked Defendant's exhibits one to five, both inclusive, as complete and genuine copies of the testimony, record and proceedings in the New York Case, Edward H. Titus against Lou [fol. 105] C. Wallick, in the Supreme Court of New York and the Appellate Division and the Court of Appeals, in which this judgment sued on was obtained.

And in connection with those exhibits we also wish to offer at this time defendant's exhibit six, marked so for

identification, which is a demand and acknowledgment of genuineness, the acknowledgement being signed by Edward H. Titus, New York, that these volumes constitute the complete record and are genuine copies.

The Court: Do you object to the competency of them?

Mr. Ford: We object to each and every one of them.

The Court: You do not object to their genuineness?

Mr. Ford: No, we have admitted their genuineness, but we certainly object to their admissibility. We contend they are not admissible, and no part of them.

The Court: The Court will take them subject to exception.

Mr. Sheridan: We object to the admission of the proffered exhibits on the ground that they are incompetent, immaterial and have no purpose in this case, not germane to any issue that is before the Court for determination, and also on the ground that all the records they now seek to offer in evidence are epitomized and summarized in plaintiff's exhibit one, an exemplified copy of the judgment in the state of New York.

The Court: The Court will take it subject to your exception, reserving decision on the admissibility until the final outcome of the situation.

And thereupon, a paper is marked for purposes of identification Exhibit No. 7.

[fol. 106] Mr. Summer: We offer this photostatic copy in evidence.

Mr. Ford: We will object, Your Honor, for the same reason as the prior objection made. It is an affidavit filed in an entirely different case. I don't know what the purpose is, but it is entirely incompetent and immaterial, and not admissible in this case.

Mr. Summer: We are offering the defendant's exhibit seven, which is an affidavit by Edward H. Titus, plaintiff, which was filed in a case down at New York brought by London Wallick against Titus, London Wallick in that case claiming that he had a 50 per cent interest in this judgment, and was asking that Edward Titus be enjoined from disposing of this judgment or the proceeds thereof. That action was brought after this suit was instituted here in Franklin County, and London Wallick asked for a temporary restraining order and Edward Titus filed this affidavit saying that he had assigned away all of his interest in this claim on which the judgment was rendered prior to

the time the suit was instituted down in New York, and said that London was asking the Court to restrain Titus from doing something which he had already accomplished, to-wit, assignment of this claim. This affidavit is competent and almost conclusive, we submit, to show that Edward Titus has no interest in this judgment or in this claim and is not the real party in interest.

The Court: Well, you may proffer it and it will be taken subject to exception, the admissible of it not being determined at this time.

And thereupon, the photostatic copy last above referred to is admitted in evidence on behalf of the defendant, subject to the above objection and exception of the plaintiff, and is hereto attached, marked Exhibit No. 7, and made a part hereof.

And thereupon, a paper writing is marked for identification herein as Defendant's Exhibit No. 8.

[fol. 107] Mr. Summer: Now, if the Court please, we wish to offer at this time defendant's exhibit No. 8, an assignment from Edward H. Titus to Walter L. Titus, dated March 31, 1924, and like for the record to show that demand was made here this morning upon plaintiff's counsel to produce this document and it was produced by them, that is by counsel for the plaintiff and, Mr. Frank, I believe that this came to you from Walter L. Titus; is that right?

Mr. Frank: I don't know from whom I got the papers, really. I got this with other papers over a year ago.

Mr. Summer: We offer this at this time.

Mr. Ford: Plaintiff objects because it is entirely incompetent, irrelevant and immaterial and inadmissible.

Mr. Summer: There is no question about it being a genuine document, is there?

Mr. Sheridan: No.

The Court: I will make the same ruling relative to this that I have as to the others. It will be taken subject to exception and the final admissibility of it to be determined hereafter.

And thereupon, the paper writing last above referred to is admitted in evidence on behalf of the defendant, subject to the above objection and exception of the plaintiff, and is hereto attached, marked Exhibit No. 8, and made a part hereof.

Mr. Summer: I don't think there is any question but that document speaks and treats of this claim on which the judgment was rendered.

The Court: It may be admitted subject to exception, Mr. Summer.

Mr. Sheridan: I think Your Honor—counsel has just offered one paper, March, 1924. Now we have here some papers in December, 1925, a re-assignment from Walter, his brother, to Edward, back to him, and I think, so it won't [fol. 108] be confusing to the Court—we are here to try out the issues ——

Mr. Summer: You will have your opportunity.

Mr. Sheridan: If this Court is going to go through these things and be on the case for an hour or two, that wherever a record shows, as just now where counsel puts in a paper which purports to be an assignment from Edward Titus to his brother to carry out the litigation, and another paper shows it was reassigned back to him, unless we are going to play fast and loose with the Court, it serves no purpose to mislead Your Honor even for an hour or two.

Mr. Summer: We are not attempting to mislead the Court.

Mr. Sheridan: I think we, as lawyers, ought to bring to the attention of the Court the proper facts.

The Court: We will have no difficulty on that score.

Mr. Summer: The defendant at this time rests.

And thereupon, the defendant rested.

And, be it Further Remembered, That the Plaintiff further to maintain the issues on his part to be maintained, introduced and offered in testimony on his behalf, the following evidence in rebuttal, towit:

And thereupon, a paper is marked for purposes of identification herein as Plaintiff's Exhibit D.

Mr. Ford: This is the agreement between Walter L. Titus and Edward H. Titus, the plaintiff in this case, dated December 1, 1925, which contains an assignment from Walter L. Titus to Edward H. Titus of all his right, title and interest in and to claim against Lou C. Wallick which is described in the agreement.

The Court: I take it as to both those exhibits, numbers seven and eight, and plaintiff's Exhibit D, the authenticity [fol. 109] and genuineness of all of them is respectively admitted on both sides; is that true?

Mr. Ford: That is right.

Mr. Summer: Defendant's Exhibits one to eight, both inclusive; that is my understanding, yes.

Mr. Ford: And plaintiff's exhibit D.

Mr. Summer: I want to say this with reference to plaintiff's exhibit D, we will admit the genuineness of the signatures on this document. We will not admit that the document was ever delivered or ever became effective. We object to it on the ground there is no showing that it has been delivered or ever became effective and we further object to it on the ground of its competency. We claim it is incompetent; that it is nothing more than a power of attorney from Walter L. Titus to Edward H. Titus to bring an action.

The Court: Well, I will receive it under the same understanding as the other exhibits, taken subject to exception.

And thereupon, the paper writing last above referred to is admitted in evidence on behalf of the plaintiff, subject to the above objection and exception of the defendant, and is hereto attached, marked Exhibit D, and made a part hereof.

Mr. Frank: With regard to defendant's exhibit eight, we might have objected just as well to the matter of delivery with regard to defendant's exhibit Eight.

Mr. Summer: Well, you cannot, because you offered that in evidence in a motion down here saying it had been executed and delivered.

Mr. Ford: I think the same thing is true of the other exhibit, is it not? The other assignment was brought to the Court's attention.

[fol. 110] Mr. Moow: Yes, it was brought to the Court's attention, but I am not accepting your admission in connection with the motion, and evidence that that has been executed and delivered.

Mr. Frank: You have had a copy of this exhibit D for some time now, Mr. Summer.

Mr. Summer: That is right.

Mr. Ford: We are not prepared right now to prove this assignment has been delivered, and with leave of Court we would be glad to submit the deposition of Mr. Walter Titus and Mr. Edward Titus as to the delivery of that instrument, and the date of delivery. They neither one of them are here now.

The Court: Well, I grant that permission.

Mr. Ford: We offer then in evidence plaintiff's exhibit D.

The Court: That is the one to which you just referred?

Mr. Frank: Yes.

Mr. Sheridan: As I understand it, the record is about completed with one exception, that Your Honor is going to permit the deposition to be taken of Mr. Walter and Edward Titus with reference to the last exhibit.

The Court: Of course, if never delivered it would not be competent under any theory. The Court is going to give either side permission to make their case complete here as far as this agreement is concerned, and then raise your legal questions.

Mr. Ford: Now, Your Honor, they have offered all of these records. In these records there is testimony which, if they are permitted to introduce part of it, we would want permission to introduce other parts.

The Court: Well, the whole thing is in.

Mr. Ford: So they offer the whole thing; it is there for any purpose.

The Court: Yes, either side.

Mr. Ford: With that understanding we rest and renew [fol. 111] the motions heretofore made.

The Court: Those will be held in abeyance.

And thereupon, the plaintiff rested in rebuttal.

And the foregoing was all of the evidence offered, introduced and admitted on behalf of plaintiff and on behalf of defendant on this trial of this cause.

Mr. Summer: Now let the record show that Mr. Ford and Mr. Frank and Mr. Summer, standing here in a court of law, attempted to reach an agreement about Plaintiff's exhibit D and Defendant's Exhibit number eight; that it is agreed that the two original exhibits may be withdrawn by counsel for plaintiff and Mr. Ford of counsel for plaintiff is to furnish to the Court or the stenographer, copies of the same and that after the taking of the depositions in this case the original exhibits are to be returned to the Court or stenographer.

[fol. 112] NOTICE TO TAKE DEPOSITIONS

The defendant will take notice that on Tuesday the 28th day of January 1936 the plaintiff above named, will take the

Depositions of Walter Titus, Edward Titus, Louis W. Severy and sundry witnesses, to be used as evidence on the trial of the above cause, at the office of Hartman, Sheridan, Tekulsky & Pecora, 285 Madison Ave., New York City, in the County of New York, State of New York, at 3:00 o'clock P. M. of said day, and that the taking of the same may be adjourned from day to day, until they are completed.

Dated January 21, 1936.

(Signed) Hartman, Sheridan, Tekulsky & Pecora, Vorys, Staer, Seymore & Pease, Attorneys for Plaintiff. (Signed) Butler and Summer, Attorney for Defendant.

January 23, 1936.

Service of the above notice is acknowledged and proof of the official character of the officer before whom the said depositions may be taken is, by agreement waived.

[fol. 113] In Court of Common Pleas, Franklin County, State of Ohio

[Title omitted]

Deposition of sundry witnesses taken before me, Jerome V. Deevey, a Notary Public of the County of New York, State of New York, in a cause pending in the Court of Common Pleas, Franklin County, State of Ohio, wherein Edward H. Titus is the plaintiff, and Lou C. Wallick is the defendant, pursuant to the annexed notice dated January 21, 1936, at the place therein mentioned, and on the adjourned date thereof, to-wit: the 29th day of January, 1936, to be read as evidence in behalf of the plaintiff upon the trial of the aforesaid cause.

Present:

Vorys, Sater, Seymour & Pease, Esqs., Hartman, Sheridan, Tekulsky & Pecora, Esqs., by Aaron Frank and Lewis F. Glaser, of Counsel, on behalf of the plaintiff.

Butler & Summer, Esqs., by Edgar Butler and William M. Summer, of Counsel, for the defendant.

Stipulation re Depositions

It Is Stipulated by and between the attorneys for the parties herein that the depositions may be taken at the office

of Hartman, Sheridan, Tekulsky & Pecora, attorneys for the plaintiff, at 5 o'clock P. M. on the 29th day of January, 1936, in the place and stead of on the 28th day of January, 1936, as set forth in the notice to take depositions dated January
[fol. 114] 21, 1936.

It Is Further Stipulated that the examinations may be taken in stenographic form and transcribed by the stenographer and that signing of the depositions by the witnesses be and the same is hereby expressly waived.

Louis W. Severy, of lawful age, being by me first duly sworn as hereinafter certified, deposes and says, as follows:

Direct examination.

By Mr. Frank:

Q. What is your full name, Mr. Severy?

Mr. Summer: At this time the defendant wishes to ask for a separation of witnesses.

Mr. Glaser: The defendant makes that point; the plaintiff has no objection. We do not think the point is well taken, but in the interest of justice we would suggest to the plaintiff and the other witness to be examined that they leave the room temporarily.

(At this point both Mr. Edward H. Titus and Mr. Walter L. Titus left the room.)

Mr. Frank (continuing):

Q. What is your full name?
A. Louis W. Severy.
Q. And your age, Mr. Severy?
A. Fifty-five.
Q. Where do you live?
A. 24 Fifth Avenue, New York City.
Q. What is your occupation?
A. Lawyer.
Q. Are you a member of the Bar of the State of New York?
A. Yes.
Q. For how many years?
A. Thirty years.

Q. Where is your office?
A. Now located at 29 Broadway.
Q. Are you a member of a firm?
A. No, not now.
[fol. 115] Q. Were you formerly a member of the firm of Ogren & Severy?
A. Yes.
Q. When was the firm dissolved?
A. That was dissolved by Mr. Ogren's death, in August 1929.
Q. (I show you Defendant's Exhibit #8, on the back of which appears the name of Ogren & Severy, and ask you whether that instrument was prepared in your office?)

Mr. Summer: Objection. I wish to make an objection at this time to the question, as the scope of this deposition is limited to the question of the delivery of the document which has been marked Plaintiff's Exhibit "D" at the trial, before Judge Leach of the Common Pleas Court, Franklin County, Ohio. The document that I am referring to is purported to be made the 1st day of December, 1925.

A. Yes.

Mr. Summer: Objection. I have an exception please, and a motion that the question and answer be stricken.

Mr. Frank: (continuing):

Q. Can you tell, Mr. Severy, whether the signature appearing on that instrument is the signature of Edward H. Titus, the plaintiff in this action?

Mr. Summer: Objection as to any questions and answers put to the witness concerning the document marked Defendant's Exhibit #8. So that there will be no interruption in the examination, the defendant wants objections, exceptions and motions for the questions and answers to be stricken, and this is to apply to each such question and answer.

A. Yes.
Q. Do you know whether Defendant's Exhibit #8 was executed on the 31st day of March, 1924?
A. To my best recollection, it was.
Q. Do you know what was done with this instrument after it was executed?

A. It was delivered by Mr. Edward H. Titus to Mr. Walter L. Titus.

Q. I show you an instrument, Plaintiff's Exhibit "D", upon the back of which appears the name Ogren & Severy, and ask you whether that instrument was prepared at your office?

A. Yes.

Q. Does your name appear on that instrument as a witness, Mr. Severy?

A. It does.

[fol. 116] Q. How many copies of that instrument were prepared?

A. I think three, including the original.

Q. The original and two copies?

A. It was executed in two parts—two counterparts, and I retained a copy in my file.

Q. When was the original executed, Mr. Severy.

Mr. Summer: Objection.

Mr. Frank: I withdraw the question.

Q. On what day, Mr. Severy, were the original and copies prepared at your office?

A. Well, to my best recollection, on or prior to the 1st day of December, 1925.

Q. Can you state what occurred with regard to the original and copies on December 1, 1925?

A. At the time of the execution of this instrument, which undoubtedly was the 1st day of December, 1925—I have no independent recollection of that fact—but on or about the day of this date this instrument was signed by Mr. Walter L. Titus and by Mr. Edward H. Titus in my presence and I witnessed it. The carbon counterpart, which is the one which you exhibited to me, was retained by Walter L. Titus and the ribbon copy was delivered to Edward H. Titus, who in turn gave it to me to retain for him.

Q. Your reference to the ribbon copy—do you mean by that, the original?

A. No, I mean the ribbon copy. They were duplicate originals.

Q. And Plaintiff's Exhibit "D"—would you say that that is the second copy?

A. Yes, it is the first carbon copy.

Q. Have you the ribbon copy in your possession?
A. I have.
Q. May I see it, please.

(Takes ribbon copy from envelope and exhibits it to Mr. Frank.)

Q. Do you say that Mr. Edward H. Titus gave you the ribbon copy after it was signed?
A. He did.
Q. And it was put into an envelope?
A. Yes.
Q. And you have that envelope?

(Mr. Severy exhibits envelope to Mr. Frank.)

A. It was put into this envelope and sealed and put into my safe.

Mr. Frank: I offer them in evidence.

[fol. 117] (An instrument dated Dec. 1, 1925 executed by Walter L. Titus and Edward H. Titus, in the presence of Louis W. Severy, said instrument being the original of Plaintiff's Exhibit "D", marked Plaintiff's Exhibit "E".)

(An envelope marked "Property of Edward H. Titus" setting forth the words "Agreement" and "Walter L. Titus and Edward H. Titus", marked Plaintiff's Exhibit "F".)

Cross-examination.

By Mr. Summer:

Q. Who directed you to prepare these documents?
A. Why—Edward H. Titus, to the best of my recollection.
Q. Did he come to your office and explain to you the type of agreement that he wanted prepared, or did Walter come to you asking you to prepare the agreement?
A. Referring to which one?
Q. I am asking you in regard to plaintiff's Exhibits "D" and "E"—the purported agreement dated Dec. 1, 1925, and I am asking you who directed you to prepare this agreement?
A. I would say, Edward H. Titus.
Q. At that time you were doing some legal work for Lord & Taylor, is that right?

A. No, not then.
Q. Not in 1925?
A. Not in 1925.
Q. At that time were your offices in the Singer Building?
A. Yes, at 149 Broadway.
Q. How long had you known Walter Titus at that time?
A. I came to know Walter Titus about 1904 or 5.
Q. So that at the time that this agreement is purported to have been drawn in December 1925, you knew Walter Titus intimately?
A. Oh, yes.
Q. And had you known his brother, Edward, intimately during that time?
A. For substantially the same period. I did not know Edward Titus as intimately at first as I did Walter. Afterwards I came to know him more intimately.
Q. Now, did Walter or Edward come to your office and ask you to prepare such an agreement as the one which we were talking about?
A. Yes.
[fol. 118] Q. Which one was that?
A. Edward H. Titus. I suggested the preparation of the papers to Edward H. Titus and he consulted his brother and directed me to draw it.
Q. Now is that before or after, if you know, this litigation was started here in New York by Edward Titus?

Mr. Frank: I object to that question. The witness has already testified to that. Exception.

A. So far as I know, it was prior to the commencement of the action, because at that time he was contemplating instituting that action.
Q. But you were not representing Edward Titus in that contemplated litigation?
A. No.
Q. And you had nothing to do in the preparation of that litigation, excepting the preparation of this legal instrument?
A. No, not with the litigation itself.
Q. That is, Edward Titus had other attorneys who were preparing to bring the Lou C. Wallick action—that is right, is it not?
A. I don't know whether he then did or not.

Q. Now, I understand, Mr. Severy, that these documents Plaintiff's Exhibits "D" and "E" respectively, are identical in form and both were signed at the same time and are, as you say, counterparts of each other?

A. I so believe—yes; they were prepared by my secretary, typed and brought to me as such.

Q. Now, did Edward Titus and Walter Titus come to your office at the same time to sign this?

A. Yes, they both came to the office and both executed it at the same time, one following the other.

Q. Now, Mr. Severy, was there any other persons present besides Mr. Walter Titus, Mr. Edward Titus and yourself when this agreement was signed?

A. Not unless Miss Swenson was in the room at the moment,—my secretary at the time.

Q. And she is the person who signs Defendant's Exhibit #8 as a notary?

A. Yes.

Q. Is there any particular reason why the one document was notarized and the other was not?

A. Not to my recollection.

Q. Is there anything about this document marked Plaintiff's Exhibit "D" which requires a certificate thereon by a Notary Public, to make it legal?

A. Not to my knowledge. It would not be entitled to be recorded here, otherwise it is as legal as any other document.

[fol. 119] Q. Now, the two copies were signed, is that right?

A. Yes.

Q. And one copy you say you passed to Walter Titus?

A. That is true.

Q. Now, just what did you do with the other copy?

A. I handed it to Walter Titus. He had both copies. He gave one to Edward Titus. Walter Titus gave the ribbon copy to Edward H. Titus—Plaintiff's Exhibit "E"—in my presence, to symbolize the delivery of the assignment to him. Edward H. Titus then gave it to me and asked me to retain it in the safe, and I had the envelope—Plaintiff's Exhibit "F" made, placed the assignment Plaintiff's Exhibit "E" in it, sealed it and placed it in the safe, and there it has remained until to-day, except for a period of time that it was in my own personal safe deposit box.

Q. Was it at your suggestion that Walter passed this document to Edward?

Mr. Frank: Objection. Exception.

A. Yes, I believe so.

Q. And who prepared the data on this envelope—Plaintiff's Exhibit "F"—if you remember?

A. It would be Miss Emma K. L. Swenson. She did all of my stenographic work at that time.

Q. At whose suggestion was that envelope prepared?

A. At mine.

Q. What directions did Walter Titus or Edward Titus give?

Mr. Frank: I object to the form of that question, insofar as it refers to Walter Titus or Edward Titus.

Q. At the time that this document was passed to Edward by Walter, and handed then by Edward to you, the three of you were present and then while the three of you were present, this envelope—Plaintiff's Exhibit "F"—was prepared?

A. I would not say that.

Q. After the envelope was prepared it was presented to the three of you, the three of you observed it, did you not?

A. No, I wouldn't say that either.

Q. All right, when Edward handed this document to you, Plaintiff's Exhibit "E", what direction did he give to you in regard to holding or disposing of it?

A. To keep it in the safe with his other papers.

Q. Did he tell you that you were to hold it and if he ever needed it in a litigation he could get it from you?

Mr. Frank: Objection. Exception.

A. I don't recall those words or anything like that.

[fol. 120] Q. At the time that Edward delivered this document to you did he say anything at all about his using the document later in court, or in any litigation?

Mr. Frank: I object to that question on the ground that it is incompetent, irrelevant and immaterial. Exception.

A. No.

Q. Did you have any understanding with Walter Titus or Edward Titus that this copy of the agreement marked Plain-

tiff's Exhibit "E" was some time later to be returned to him?

A. No.

Mr. Frank: Objection, and motion to strike from the record. Exception.

(Signed) ——— ———.

Sworn to before me this 31st day of January, 1936. (Signed) Jerome V. Deevy, Notary Public, Bronx County. Bronx Co. Clks. No. 129, Reg. No. 150d37. N. Y. Co. Clk.'s No. 723, Reg. No. 7D462. Kings Co. Clk's No. 74, Reg. No. 7270. Queens Co. Clk's No. 2035, Reg. No. 7558. Commission Expires March 30, 1937.

Mr. Titus then reentered the room, as a witness.

Edward H. Titus, of lawful age, being by me first duly sworn as hereinafter certified, deposes and says, as follows:

Direct examination.

By Mr. Frank:

Q. What is your full name, Mr. Titus?
A. Edward H. Titus.
Q. And your age?
A. Sixty-eight years old.
Q. And where is your place of residence?
A. Closter, New Jersey.
Q. What is your occupation, Mr. Titus?
A. Not anything particularly, at the present moment.
Q. I show you Defendant's Exhibit #8, and ask you whether your signature appears thereon?

Mr. Summer: I wish to make the same objection here in regard to any examination concerning the Defendant's Exhibit 8, on the ground that the scope of this deposition is limited to the question of delivery of document marked Plaintiff's Exhibit "D".

Q. When did you sign this instrument—Defendant's Exhibit 8, Mr. Titus?
A. On the date that appears on the paper.
[fol. 121] Q. That is March 31, 1924?

A. That is correct.

Q. And what did you do with the instrument after you signed it?

A. I left the original copy with Mr. Severy to be put in his safe deposit box to keep for me.

Mr. Summer: Now, I wish to make the record clear on my objection, that the scope of this deposition is limited and therefore object to any questions and answers concerning defendant's Exhibit 8, and ask for exceptions and make separate motions to each such question and answer that the same be stricken.

A. Continuing—this is the paper that was delivered to my brother, Walter. I signed that paper. I delivered the original copy to him in Mr. Severy's presence, in his office.

Q. Then you did not give that instrument to Mr. Severy?

A. My recollection is that I did not. I may have; it is a long time ago, but I gave the original to my brother and I had a copy of it myself.

Q. I show you plaintiff's Exhibit "D", and ask you whether your signature appears on that instrument?

A. That is my signature, yes.

Q. When did you sign that instrument?

A. On the day that it is dated, I think it is December 1st.

Q. 1925?

A. 1925.

Q. I show you Plaintiff's Exhibit "E", and ask you whether your signature appears thereon?

(Mr. Frank hands Mr. Titus a document.)

A. There is my signature, yes.

Q. Was that also signed on Dec. 1, 1925?

A. At the same time and same day. This paper was signed on the 1st day of December, 1925, in Mr. Severy's office, with my brother present.

Q. And Plaintiff's Exhibit "D" was signed when, Mr. Titus?

A. It was signed on the day it was dated—1st day of December, 1925.

Q. Do you recognize the signature appearing on Plaintiff's Exhibit "D" above your own signature, Mr. Titus?

A. Yes, I do.

Q. Whose signature is that?

A. My brother's.

Q. Do you recognize the signature appearing on Plaintiff's Exhibit "E" above your own signature.

A. I do.

Q. Whose signature is that?

A. My brother's.

[fol. 122] Q. What was done with Plaintiff's Exhibit "D" and Plaintiff's Exhibit "E", after they were signed?

A. That is the assignment back to me. It was delivered to me by my brother, in Mr. Severy's office.

Q. Can you state specifically, Mr. Titus, which one of these documents was given to you?

A. The original paper was given to me.

Q. And is that Plaintiff's Exhibit "E"?

A. Yes.

Q. And what did you do with that instrument—Plaintiff's Exhibit "E", after you received it?

A. My recollection is that I turned it over to Severy's care to hold for me.

Q. How long did he hold that instrument—Plaintiff's Exhibit "E"—for you?

A. Quite a long while; I don't know, as a matter of fact.

Cross-examination.

By Mr. Summer:

Q. Mr. Titus, just before you started to testify, you had a conversation with Mr. Frank?

A. Not pertaining to this.

Q. He didn't tell you what Mr. Severy testified about?

A. No.

Mr. Summer (speaking to Mr. Frank): Is that right, Mr. Frank?

Mr. Frank: That is right.

Q. Now, who employed Mr. Severy to prepare this instrument dated Dec. 1st, 1925?

Mr. Glasser: I object to that question on the ground, that it is immaterial, irrelevant and incompetent, not within the purview of the deposition, and I ask that the question and answer be stricken.

A. I did. I asked Mr. Severy to draw that paper. He had done several things for me during the course of the last twenty-five years.

Q. Was your brother, Walter, present when you asked Mr. Severy to prepare that paper?

A. I can't say whether he was or not. My brother knew that I was going to have that paper drawn. I feel quite certain that he knew that Mr. Severy was going to prepare it.

Q. Now, you are absolutely certain that this document was signed on December 1, 1925, are you?

A. As sure as I can be of anything.

[fol. 123] Q. Were you living in Closter at that time?

A. Well, my home has been in Closter right along. I may have been in New York for the winter time, but my home was in Closter.

Q. Do you recall the general condition of your health at that time?

Mr. Glaser: I object to that on the ground that it is immaterial, irrelevant and incompetent and ask that it be stricken out. Exception.

A. I don't mind answering that. I have always had pretty good health.

Q. Were you in Florida or California any time during that winter of 1925 or '26?

A. No.

Q. Now, on the occasion of signing this document which bears date of December 1, 1925 and which you have before you,—just who were present?

A. No one other than Mr. Severy, my brother and myself.

Q. And you and your brother, Walter, each signed the document in duplicate—signed two of them?

A. Yes.

Q. And then what was done with the two copies that were signed.

A. One was taken by my brother and the other left with Mr. Severy to keep for me, and he had other papers of mine at that time.

Q. What direction did you give Mr. Severy as to what he was to do with this document that was turned over to him?

A. He was instructed to keep it for me until such time that I wanted to use it.

Q. Who gave those instructions to Mr. Severy, did you or Walter.

A. I gave those instructions, in my brother's presence.

Q. So Mr. Severy continued to hold this document, Plaintiff's Exhibit "E", from that time up until to-day, is that right?

A. I haven't had it. I may have had a copy of it but I didn't have the original. My brother and I were in unison all the way through on this. I recall that I went there once and had him make me a copy of it. I wanted to keep it there so that I'd know where it was.

Q. Now, Mr. Titus, after this suit was filed out in Franklin County, Ohio, your attorneys had you produce for them one of these original documents dated Dec. 1, 1925, is that right?

A. They had me produce one of these papers. Yes, they did.

[fol. 124] Q. And you went to your brother, Walter, and got his copy and turned it over to your attorneys?

A. Yes, that is what I would say I did for the time being. I could not find the copy that I had.

Q. Why didn't you go to Mr. Severy?

A. I don't know why.

Q. Well, you knew that Mr. Severy had your original copy, did you not?

A. Yes.

Q. And you knew that that was the original of the two?

A. I knew that Mr. Severy had the original. I may have gotten the one from my brother because I see him frequently, or I may have had a copy made at Mr. Severy's.

Q. But the fact is, that when your attorneys asked you to produce the original, instead of going to Mr. Severy you went to your brother.

Mr. Glaser: Note objection, exceptpion and motion to strike out.

Q. It is a fact that when your attorneys asked you to produce the original of this document you went to your brother, Walter, instead of Mr. Severy?

Mr. Glaser: Same objection.

A. I said a moment ago—I may have gotten it from my brother or Mr. Severy. I wouldn't swear which one, but I may have gotten it from either one.

Q. Now Mr. Titus, you do know, or don't you, that Mr. Severy to-day produced from his strong box or from his office the original of this document, marked Plaintiff's Exhibit "E".

A. Very likely he could. I didn't know until I came in here.

Q. You didn't produce it to-day, did you?

A. I did not.

Q. But heretofore you have handed over to your attorneys the original of this document?

A. A long while ago.

Q. And that is the document which is marked Plaintiff's Exhibit "E"; is it not?

A. Well, I don't know whether it is or not.

Q. Isn't it a fact, Mr. Titus, that the reason why this original was left with Mr. Severy was that you and your brother, Walter, had an arrangement whereby the original was to be turned back to Walter, in the event you didn't have to use it?

Mr. Glaser: Objected to on all the grounds previously urged and motion renewed to strike the answer.

[fol. 125] A. I don't recall any such arrangement. I left it with Mr. Severy for the purpose that I stated here in the early part of this examination, and I might add that my brother wouldn't have asked him for it or Mr. Severy delivered it to him without my consent.

Q. Do you recall where Mr. Severy's office was at the time you signed this document?

A. I do.

Q. Where was it?

A. 149 Broadway.

Q. And at the time you signed this document, other attorneys for you were preparing the papers in the litigation against Mr. Lou C. Wallick, is that right?

Mr. Glaser: Objected to on all the grounds previously urged on the ground that the question is not only irrelevant, incompetent and immaterial but not within the purview of the deposition and a motion is made to strike the answer and question.

Q. The document referred to is the one dated December 1st, 1925.

Mr. Glaser: Same objection on all the grounds previously urged.

A. I can't answer that; I don't know.

Redirect examination.

By Mr. Glaser:

Q. Mr. Titus, the questions that were asked you on cross-examination had reference to a state of facts almost eleven years ago, is that correct?

A. That is correct.

(Signed) Edward H. Titus.

Sworn to before me this 31st day of January, 1936. (Signed) Jerome V. Deevy, Notary Public Bronx County. Commission Expires March 30, 1937.

[fol. 126] In Court of Common Pleas, Franklin County, State of Ohio

[Title omitted]

Certificate

State of New York,
County of New York, ss:

I, Jerome V. Deevy, a Notary Public in and for the County and State of New York aforesaid, duly commissioned and qualified, do hereby certify that the above named Louis W. Severy and Edward H. Titus were by me first sworn, to testify to the truth, the whole truth and nothing but the truth; that their depositions were taken in my presence and hearing as above set forth, were reduced to writing by Miss Harriet Levy, an employee in the office of Hartman, Sheridan, Tekulsky & Pecora, Esqs., who is a proper person and who is not interested in any way in the case of Titus vs. Wallick, or in any matter connected therewith, in the presence of the witnesses and were subscribed by said witnesses in my presence and were taken at the place specified in the notice annexed hereto and on the adjourned date thereof, to wit: the 29th day of January, 1936, and that annexed to said depositions are defendant's Exhibit No. 8, plaintiff's Exhibit D and plaintiff's Exhibits offered in evidence at the time of the taking of the depositions above set forth, to wit: plaintiff's Exhibits E and F.

[fol. 127] I do further certify that I am not counsel, attorney or a relative of either party or otherwise interested in the event of this suit or in any matters connected therewith

except that I am an attorney employed by the firm of Hartman, Sheridan, Tekulsky & Pecora, Esqs.

In Witness Whereof, I have hereunto set my hand and seal of office this 31st day of January, 1936.

(Signed) Jerome V. Deevy, Notary Public, New York County, New York. (Seal.)

Clerk's certificate to notary public omitted in printing.

[fol. 128] (Note.—For Exhibit "A", See Petition)

Exhibit "B"

The People of the State of New York, by the grace of God free and independent, to all to whom these presents shall come or may concern, Greeting:

(Seal.)

Know Ye, That we having examined the records and files in the office of the Clerk of the County of New York and Clerk of the Supreme Court of said State for said County, do find a certain Order Judgment there remaining, in the words and figures following, to wit:

[fol. 129] At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 24th day of May, 1935.

Present: Hon. Francis Martin, Presiding Justice; Hon. Edgar S. K. Merrell, Hon. John V. McAvoy, Hon. James O'Malley, Hon. Irwin Untermyer, Justices.

809

Edward H. Titus, Respondent,

against

Lou C. Wallick, Appellant

Order of Affirmance on Appeal from Judgment

An appeal having been taken to this Court by the defendant from a judgment of the Supreme Court, New York County, entered on or about the 1st day of May, 1934, and

said appeal having been argued by Mr. Samuel D. Jones of counsel for the appellant, and by Mr. Thomas I. Sheridan of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed; and that the respondent recover of the appellant the costs of this appeal.

[fol. 130] Supreme Court of the State of New York, County of New York

Edward H. Titus, Plaintiff,

against

Lou C. Wallick, Defendant

An appeal having been taken to the Appellate Division of the Supreme Court, First Department, by the defendant from a judgment of the Supreme Court, New York County, entered in the Office of the Clerk of the County of New York, on or about the 1st day of May, 1934, whereby it was adjudged that the report of the Hon. Jeremiah T. Mahoney, Referee herein, be confirmed and that the plaintiff have judgment against the defendant in the sum of $389,103.21. and said appeal having been heard and the said Appellate Division having by an order entered in the Office of the Clerk of said Appellate Division on the 24th day of May, 1935, unanimously affirmed said judgment with costs of said appeal to the plaintiff, and the record on said appeal, together with a certified copy of said order having been remitted to the Office of the Clerk of the County of New York, and the costs having been duly taxed in the sum of $90.53. it is

On Motion of Hartman, Sheridan, Tekulsky & Pecora, attorneys for the plaintiff,

Adjudged that the judgment of this court, entered on the 1st day of May, 1935, be and the same hereby is affirmed with costs; and it is further

Adjudged that the plaintiff, Edward H. Titus, do recover of the defendant, Lou C. Wallick, the sum of ninety and 53/100 ($90.53) dollars costs, as taxed, and that the plain-

[fol. 131] tiff have execution therefor.

Dated, New York, June 5th 1935.

Albert Marinelli, Clerk.

No. 155477

State of New York,
County of New York, ss:

I, Albert Marinelli, Clerk of the said County and Clerk of the Supreme Court of said State for said County, Do Certify, That I have compared the preceding with the original judgment on file in my office, and that the s-me is a correct Transcript therefrom, and of the whole of such original Indorsed Filed. June 5, 35

In witness whereof, I have hereunto subscribed my name and affixed my official seal, this 9 day of Oct 1935

(Signed) Albert Marinelli, Clerk.

(Duly authenticated.)

No. 155477

State of New York,
County of New York, ss.

I, Albert Marinelli, Clerk of the said County and Clerk of the Supreme Court of said State for said County, Do Certify, That I have compared the preceding with the original judgment on filed in my office, and that the same is a correct transcript therefrom, and of the whole of such original. Indorsed Filed June 5, 35.

In Witness Whereof, I have hereunto subscribed my name and affixed my official Seal, this 9th day of Octo. 1935.

Albert Marinelli, Clerk. (Seal.)

[fol. 132] Exhibit "C"

The People of the State of New York, by the grace of God free and independent, to all to whom these presents shall come or may concern, Greeting:

(Seal.)

Know Ye, That we having examined the records and filed in the office of the Clerk of the County of New York and Clerk of the Supreme Court of said State for said County,

do find a certain Judgment there remaining, in the words and figures following, to wit:

[fol. 133] SUPREME COURT, NEW YORK COUNTY

EDWARD H. TITUS, Plaintiff,

against

LOU C. WALLICK, Defendant

A judgment in this action in favor of the defendant and against the plaintiff dismissing the complaint having been made and entered in the office of the Clerk of the County of New York on February 16th, 1931, and plaintiff having appealed from said judgment to the Appellate Division of the Supreme Court, First Department, and said Appellate Division of the Supreme Court, First Department having, by an order dated February 26th, 1932, and filed March 11th, 1932, reversed said judgment and granted judgment to the plaintiff, and the judgment of reversal thereon having been entered in the office of the Clerk of the County of New York on March 16th, 1932, providing, among other things, that the plaintiff recover of the defendant the sum of $1,527.55, costs of said appeal,

And the defendant having appealed therefrom to the Court of Appeals, and the Court of Appeals having sent hither its remittitur, filed July 22nd, 1932, by which it appears that said Court of Appeals has affirmed said judgment in all things, with costs, and has given judgment accordingly, and has remitted the judgment of the said Court of Appeals to this Court, to be enforced according to law; and this Court having by an order entered herein on July 22nd, [fol. 134] 1932, ordered that said judgment be made the judgment of this court, and plaintiff's costs having been taxed in the sum of $229.50.

Now on motion of Hartman, Sheridan, Tekulsky & Pecora, attorneys for the plaintiff, it is

Adjudged, that the judgment entered in the office of the Clerk of the County of New York, on March 16th, 1932, in favor of the plaintiff and against the defendant be in all things affirmed; and, it is further

Adjudged, that the said order and judgment of the Court of Appeals be, and the same are hereby made the order and judgment of this Court; and, it is further

Ordered, Adjudged and Decreed, that the defendant, Lou C. Wallick, forthwith transfer and deliver to the plaintiff 250 shares of the capital stock of the Secor Hotel Company, representing a one-quarter interest therein; and, it is further

Ordered, Adjudged and Decreed, that the defendant, Lou C. Wallick, account to the plaintiff touching the issues, benefits, profits, earnings and income, together with interest from the respective dates when such profits, income or earnings were distributed and were received by him or for his benefit and to which the plaintiff's said stock should have been or become entitled by reason of his one-quarter interest in and to the property, earnings, profits and income of such corporation since October 27th, 1908; and, it is further

Ordered, Adjudged and Decreed, that an account be taken of the sums distributed as earnings of the Secor Hotel Company and of any successor thereof subsequent to October 27th, 1908, and the sums that have been received by the defendant as dividends or otherwise, and particularly with respect to the moneys applicable to the plaintiff's said shares [fol. 135] of stock; and it is further

Ordered, Adjudged and Decreed, that after such account such other, further and final decree be made in this action as may be equitable and just; and, it is further

Ordered, Adjudged and Decreed, that the plaintiff, Edward H. Titus, recover of and from the defendant Lou C. Wallick, his costs and disbursements as taxed, amounting to the sum of $229.50, and the plaintiff have execution therefor; and, it is further

Ordered, Adjudged and Decreed, that either party to this action shall have leave to apply to this court upon notice for such other and further relief, directions and orders herein as shall be proper within the findings and decree herein made.

Judgment, July 25, 1932.

Daniel E. Finn, Clerk.

Sir:

Please to take notice that the within is a true copy of a judgment duly made and entered in the within entitled action and filed in the office of the Clerk of Supreme C't.

N. Y. County on this 25 day of July 1932. Dated July 25 1932.

Yours, Hartman, Sheridan, Tekulsky & Pecora, Attorneys for plaintiff, Office and Post Office Address, 285 Madison Avenue, Borough of Manhattan, New York City.

To Olvany, Eisner & Donnelly Exq., Attorneys for defendant.

Year 1926

Index No. 2612

SUPREME COURT, NEW YORK COUNTY

EDWARD H. TITUS, Plaintiff,

vs.

LOU C. WALLICK, Defendant

Judgment With Notice of Entry

Hartman, Sheridan, Tekulsky & Pecora, Attorneys for defendant.

[fol. 136] No. 1986 C.

All of which we have caused by these presents to be exemplified, and the Seal of our said Supreme Court to be hereunto affixed.

Witness, Hon. William T. Collins, a Justice of the Supreme Court for the County of New York, the 10th day of Oct. in the year of our Lord one thousand nine hundred and 35 of our independence the one hundred and 60.

(Signed) Albert Marinelli, Clerk. (Seal.)

I, William T. Collins a Presiding justice at a Special Term of the Supreme Court of the State of New York for the County of New York, do hereby certify that Albert Marinelli whose name is subscribed to the preceding exemplification, is the Clerk of the said County of New York, and Clerk of said Supreme Court for said County duly elected and sworn and that full faith and credit are due to his official acts. I further certify that the Seal affixed to the ex-

emplification is the seal of our said Supreme Court, and that the attestation thereof is in due form.

Dated, New York, Oct. 10th, 1935.

(Signed) William T. Collins, Justice of the Supreme Court of the State of New York.

STATE OF NEW YORK,
County of New York, ss:

I, Albert Marinelli, Clerk of the Supreme Court of said State in and for the County of New York, do hereby certify that Hon. William T. Collins whose name is subscribed to the preceding certificate, is Presiding Justice at a Special Term of the Supreme Court of said State in and for the County of New York, duly elected and sworn, and that the signature of said Justice to said certificate is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court this 10 day of October 1935.

(Signed) Albert Marinelli, Clerk. (Seal.)

[fol. 137] EXHIBIT "D"

This Agreement made the 1st day of December, 1925, between Walter L. Titus, residing in the Borough of Manhattan, City and State of New York, hereinafter called the party of the first part, and Edward H. Titus, residing at Closter, in the State of New Jersey, hereinafter called the party of the second part, Witnesseth:

Whereas, the party of the first part has a claim against one Lou C. Wallick for two hundred and fifty (250) shares of the capital stock of the Secor Hotel Company, which claim originally accrued in favor of the party of the second part and was thereafter assigned by him to the party of the first part by an instrument in writing dated the 31st day of March, 1924; and

Whereas, said assignment was made and delivered upon the oral understanding that the party of the first part would use any funds that might be derived therefrom to pay off and discharge certain indebtedness of the party of the second part hereinafter mentioned; and

Whereas, the party of the second part wishes to institute an action against said Lou C. Wallick to recover said stock; and

Whereas, the party of the first part is willing to re-assign said claim to the party of the second part upon the terms and conditions hereinafter stated:

Now, Therefore, in consideration of the sum of One ($1.00) Dollar, paid by the party of the second part to the party of the first part, the receipt whereof is hereby acknowledged, it is hereby mutually agreed as follows:

1. The party of the first part agrees to and does hereby sell, assign, transfer and set over unto the party of the second part all his right, title and interest in and to said claim against Lou C. Wallick, and all his right, title and [fol. 138] interest in and to said two hundred and fifty (250) shares of the capital stock of the said Secor Hotel Company above described.

2. The party of the first part agrees to and does hereby appoint the said party of the second part to be his true and lawful attorney, irrevocably, for him, and in his name and stead, but for the party of the second part's own benefit, to sell, assign, transfer, set over, pledge, compromise, or discharge the whole, or any part, of said claim, and to do all acts and things necessary, or proper, for any such purpose, and to ask, collect, receive and due for said stock, or for any moneys which may grow due, upon said claim, and to substitute one person, or more, with like powers; hereby ratifying and confirming all that the party of the second part, or his substitute, or substitutes, shall lawfully do, by virtue hereof.

3. The party of the second part agrees that he will receive, as the property of the party of the first part, any stock certificates, checks, drafts or money applicable to said claim, which shall at any time come into the possession or control of the party of the second part, and will immidiately endorse, transfer and deliver same to the party of the first part, to have and to hold the same and every part thereof, for the following uses and purposes, to wit:

(a) To pay and discharge all the just and reasonable expenses, costs and charges incurred in connection with the collection thereof.

(b) To repay one-half of the balance thereof to Emilie F. Titus, Closter, N. J., her executors, administrators or assigns.

(c) To reimburse the party of the first part for one-half of any and all moneys heretofore or hereafter paid out and disbursed by him in paying and discharging the debts and [fol. 139] liabilities incurred by James L. Titus under the firm name and style of Titus Brothers to the extent that such one-half exceeds one-half of the moneys heretofore or hereafter paid out and disbursed by the party of the second part in paying off and discharging the debts and liabilities incurred by said James L. Titus under the firm name and style of Titus Brothers, as aforesaid, to the end that all disbursements made by either of the parties hereto in discharging such debts and liabilities shall be borne by them equally.

(d) To pay off and discharge in full, if the residue of said proceeds, after the payment of the foregoing is sufficient for that purpose, the principal and interest on a certain promissory note for Eleven thousand three hundred sixty-one and 25/100 ($11,361.25) Dollars given by the party of the second part to Margaret G. Titus.

(e) To pay off and discharge any and all of the indebtedness now due, or to become due, from the party of the second part to the party of the first part.

(f) To repay to the party of the second part, his executors, administrators or assigns, the surplus remaining after the payment and discharge of the foregoing.

4. The parties hereto mutually agree that this agreement shall be binding upon their heirs, executors and administrators.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

(Signed) Walter L. Titus. (L. S.) Edward Titus. (L. S.)

In presence of —— ——.

[fol. 140] PLAINTIFF'S EXHIBIT "E"

January 29, 1936

Jerome V. Deevy, Notary Public

This Agreement made the 1st day of December, 1925, between Walter L. Titus, residing in the Borough of Manhat-

tan, City and State of New York, hereinafter called the party of the first part, and Edward H. Titus, residing at Closter, in the State of New Jersey, hereinafter called the party of the second part, Witnesseth:

Whereas, the party of the first part has a claim against one Lou C. Wallick for two hundred and fifty (250) Shares of the capital stock of the Secor Hotel Company, which claim originally accrued in favor of the party of the second part and was thereafter assigned by him to the party of the first part by an instrument in writing dated the 31st day of March, 1924; and

Whereas, said assignment was made and delivered upon the oral understanding that the party of the first part would use any funds that might be derived therefrom to pay off and discharge certain indebtedness of the party of the second part hereinafter mentioned; and

Whereas, the party of the second party wishes to institute an action against said Lou C. Wallick to recover said stock; and

Whereas, the party of the first part is willing to re-assign said claim to the party of the second part upon the terms and conditions hereinafter stated;

Now, Therefore, in consideration of the sum of One ($1.00) Dollar, paid by the party of the second party to the party of the first part, the receipt whereof is hereby acknowledged, it is hereby mutually agreed as follows:

1. The party of the first part agrees to and does hereby sell, assign, transfer and set over unto the party of the second part all his right, title and interest in and to said claim against Lou C. Wallick, and all his right, title and interest in and to said two hundred and fifty (250) shares of the capital stock of the said Secor Hotel Company above described.

[fol. 141] 2. The party of the first part agrees to and does hereby appoint the said party of the second part to be his true and lawful attorney, irrevocably, for him, and in his name and stead, but for the party of the second part's own benefit, to sell, assign, transfer, set over, pledge, compromise, or discharge the whole, or any part, of said claim, and to do all acts and things necessary, or proper, for any such purpose, and to ask, collect, received and sue for said stock, or for any moneys which may grow due, upon said claim, and to substitute one person, or more, with like powers;

hereby ratifying and confirming all that the party of the second part, or his substitute, or substitutes, shall lawfully do, by virtue hereof.

3. The party of the second part agrees that he will receive, as the property of the party of the first part, any stock certificates, checks, drafts, or money applicable to said claim, which shall at any time come into the possession or control of the party of the second part, and will immediately endorse, transfer and deliver same to the party of the first part, to have and to hold the same and every part thereof, for the following uses and purposes, to wit:

(a) To pay and discharge all the just and reasonable expenses, costs and charges incurred in connection with the collection thereof.

(b) To repay one-half of the balance thereof to Emilie F. Titus, Closter, N. J., her executors, administrators or assigns.

(c) To reimburse the party of the first part for one-half of any and all moneys heretofore or hereafter paid out and disbursed by him in paying and discharging the debts and liabilities incurred by James L. Titus under the firm name and style of Titus Brothers to the extent that such one-half exceeds one-half of the moneys heretofore or hereafter paid out and disbursed by the party of the second part in paying off and discharging the debts and liabilities incurred by said [fol. 142] James L. Titus under the firm name and style of Titus Brothers, as aforesaid, to the end that all disbursements made by either of the parties hereto in discharging such debts and liabilities shall be borne by them equally.

(d) To pay off and discharge in full, if the residue of said proceeds, after the payment of the foregoing is sufficient for that purpose, the principal and interest on a certain promissory note for Eleven Thousand three hundred sixty-one and 25/100 ($11,361.25) Dollars given by the party of the second part to Margaret G. Titus.

(e) To pay off and discharge any and all of the indebtedness now due, or to become due, from the party of the second part to the party of the first part.

(f) To repay to the party of the second party, his executors, administrators, or assigns, the surplus remaining after the payment and discharge of the foregoing.

(4) The parties hereto mutually agree that this agreement shall be binding upon their heirs, executors, and administrators.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

(Signed) Walter L. Titus. (L.S.) (Signed) Edward H. Titus. (L.S.)

In presence of Jerome V. Deevy.

[fol. 143] PLAINTIFF'S EXHIBIT "F"

January 29, 1936

Jerome V. Deevy, Notary Public

(Envelope)

Property of Edward H. Titus

Walter L. Titus

and

Edward H. Titus

Agreement

[fol. 144] EXCERPTS FROM EXHIBIT 1

[fol. 145] At a Special Term, Part III of the Supreme Court of the State of New York, held in and for the County of New York at the County Court House in the Borough of Manhattan, City and State of New York, on the 31st day of May, 1929.

Present: Hon. Louis A. Valente, Justice.

EDWARD H. TITUS, Plaintiff,

against

LOU C. WALLICK, Defendant

ORDER APPEALED FROM

The defendant, Lou C. Wallick, having applied to this court to set aside an interlocutory judgment in favor of the plaintiff and against the defendant, made and entered in

the above action on the 2nd day of April, 1928, and to set aside and to vacate an order made and entered in this action [fol. 146] on the 30th day of March, 1928, directing an accounting and appointing a Referee pursuant to said interlocutory judgment, and said defendant having applied for a new trial herein on the ground of newly discovered evidence which would probably change the result upon a new trial, upon the ground also that the plaintiff perpetrated a fraud upon the court and the defendant at the trial of this action, and upon the further ground that the ends of justice require the granting of such a new trial; and said motion having duly come on to be heard,

Now, upon reading and filing the defendant's notice of motion dated February 14th, 1929, and the affidavits of the defendant Lou C. Wallick sworn to on the 14th day of February, 1929, the 16th day of March, 1929, and the 28th day of March, 1929, and upon a copy of the agreement between the plaintiff Edward H. Titus and London Wallick, dated November 23rd, 1925, and a copy of a letter dated January 17th, 1926, both annexed as exhibits for the aforesaid affidavit of Lou C. Wallick sworn to the 14th day of February, 1929, and upon the affidavit of Frank F. Gentsch sworn to the 9th day of March, 1929, the affidavit of James F. Donnelly, sworn to the 15th day of March, 1929, the affidavit of Anthony Krayer sworn to the 11th day of March, 1929, the affidavit of James E. Koozer sworn to the 11th day of March, 1929, and the affidavit of Anthony Stilger sworn to the 15th day of March, 1929, and upon the printed case on appeal of the Appellate Division, First Department, in this action duly certified to and filed in the office of the Clerk of the County of New York on the 15th day of April, 1927, and upon a copy of the opinion of the Appellate Division, [fol. 147] First Department in this action, dated November, 1927, and upon the resettled order of the Appellate Division, First Department, filed in the office of the Clerk of that court on February 8th, 1928, reversing the judgment of the Supreme Court, New York County, made and entered on January 3rd, 1927, in favor of the plaintiff and against the defendant, which resettled order of the Appellate Division, First Department, directed the entry of an interlocutory judgment in favor of the plaintiff and against the defendant, and upon the filed interlocutory judgment in favor of the plaintiff and against the defendant made and

entered on the 2nd day of April, 1928, all submitted in support of said application, and upon the affidavits of Edward H. Titus duly sworn to the 8th day of March, 1929 and the 25th day of March, 1929, and upon a copy of the letter dated April 21st, 1926, annexed as an exhibit to the said affidavit of Edward H. Titus sworn to the 8th day of March, 1929, and upon a copy of an affidavit of Anthony E. Stilger sworn to the 8th day of May, 1925 annexed to said affidavit of Edward H. Titus sworn to the 23rd day of March, 1929, and upon the affidavit of William E. Sims sworn to the 22nd day of March, 1929, the affidavit of George Zabriskie sworn to the 23rd day of March, 1929, the affidavit of George Neumann sworn to the 19th day of March, 1929, the affidavit of Louis W. Severy sworn to the 19th day of March, 1929, and the affidavit of Joseph Schultz sworn to the 25th day of March, 1929, all submitted in opposition to the said defendant's application; and after hearing Olvany, Eisner & Donnelly, Esqs., attorneys for the defendant, James F. Donnelly Esq., in support of said application, and Joseph Schultz, Esq., attorney for the plaintiff, Lewis F. Glazer, Esq., in [fol. 148] opposition thereto; and due deliberation having been had, and it appearing to my satisfaction that the trial of this action was closely contested, and that before the trial the plaintiff Edward H. Titus and London Wallick, one of said plaintiff's witnesses, had entered into an arrangement and agreement whereby London Wallick was to share in the proceeds of this litigation, and that this agreement was material and went to the very heart of the case, and that the plaintiff suppressed his arrangement with London Wallick and himself and that such suppression was a fraud upon the Court and the defendant herein, and it further appearing to my satisfaction that the defendant had no knowledge of the aforementioned arrangement and agreement between the plaintiff and London Wallick, either before or at the trial, that the plaintiff could not, in the exercise of diligence, have discovered the said newly discovered evidence before the trial, and that the defendant within a reasonable time after discovery thereof, made this application for a new trial, and it further appearing to my satisfaction that said new evidence would probably change the result of the determination of the Appellate Division, First Department, and that the interests of justice required the granting of the defendant's application for a new trial, and upon the filed memorandum of this Court.

It is, on motion of Olvany, Eisner & Donnelly, Esqs., attorneys for the defendant,

Ordered, that the said application for a new trial be and the same hereby is granted, and it is

Further Ordered, that the interlocutory judgment in favor of the plaintiff and against the defendant, made and entered [fol. 148-1] on the 2nd day of April, 1928, be and the same hereby is vacated and set aside, and the Clerk of this Court is directed to make an entry in his docket showing the setting aside and vacation of the aforementioned interlocutory judgment; and it is

Further Ordered that the order of this Court made and entered on the 30th day of March, 1928, directing an accounting and appointing a Referee herein pursuant to said aforementioned interlocutory judgment be and the same hereby is vacated and set aside, and it is

Further Ordered, as a condition to the granting of the defendant's application for a new trial, that the said defendant, Lou C. Wallick, pay the fees of the Referee, Hon. Joseph Kahn, amounting to $800, and pay the costs of the stenographic minutes taken before the said Referee amounting to the sum of $504, to Harman & Lowe, court stenographers; and it is

Further Ordered, that upon the payment of the above fees the above cause may be restored to the calendar and set down for trial by either party on the calendar of Special Term, Part III of this Court, upon five days' notice.

Enter.

L. A. V., J. S. C.

[fol. 148-2] Supreme Court, New York County

Edward H. Titus, Plaintiff,

against

Lou C. Wallick, Defendant

Notice of Motion

Sir:

Please Take Notice that on the printed case on appeal in the above entitled action, duly certified to and filed in the

office of the Clerk of the County of New York, on the 15 day of April, 1927, upon the opinion of the Appellate Division, First Department, dated November, 1927, and upon the resettled order of the Appellate Division, First Department, filed in the office of the Clerk of that court on February 8, 1928, reversing the judgment of the Supreme Court, New York County, dated January 3, 1927, in favor of the defendant, and directing the entry of an interlocutory judgment in favor of the plaintiff, and against the defendant, made and entered in the office of the Clerk of the Supreme Court, New York County, on the 2nd day of April, 1928, and on the affidavit of Lou C. Wallick, sworn to the 14th day of February, 1929, which are hereunto annexed, and on all the proceedings had in the above entitled action, a motion will be made in Special Term, Part III, of the Supreme Court [fol. 148-3] of the State of New York, to be held in and for the County of New York, at the County Court House in the Borough of Manhattan, City and State of New York, on the 26th day of February, 1929, at 10 A. M., for an order setting aside the judgment entered in the above entitled action and duly filed in the office of the Clerk of the County of New York, on the 2nd day of April, 1928, and setting aside and vacating an order made and entered on the 30th day of March, 1928, directing an accounting and appointing a referee, and for a new trial therein on the ground that the evidence set forth in the papers above cited is newly discovered evidence and would have the effect of changing the result upon a new trial, on the ground that plaintiff perpetrated a fraud upon the court and the defendant at the trial herein, and upon the further ground that the ends of justice require the granting of a new trial, and for such other and further relief as to this court may seem just and proper in the premises.

Please Take Further Notice that this notice of motion is served on you at least ten days before the hearing thereof and that you are, therefore, required to serve upon the undersigned the answering affidavits on behalf of the plaintiff at least five days before the return date of this motion.

Dated, New York, February 14, 1929.

Yours, etc., Olvany, Eisner & Donnelly, Attorneys for Defendant, Office and P. O. Address, 292 Madison Avenue, Borough of Manhattan, City of New York.

[fol. 148-4] To Joseph Schultz, Esq., Attorney for Plaintiff, 522 Fifth Avenue, New York, N. Y.

[fol. 148-5] THE ROOSEVELT

Agreement made between London I. Wallick and E. H. Titus Nov. 23rd, 1925, as regards the prosecution of the claim of E. H. Titus against Lou C. Wallick for an accounting for 250 shares of stock of Secor Hotel Co., Toledo, O.

Mr. E. H. Titus agrees to prosecute his claim and if Mr. Lou C. Wallick in his answer denies same, then Mr. London I. Wallick agrees to prosecute his claim against Lou C. Wallick for obtaining a contract of sale of his holdings or under a misrepresentation of the facts. Both Mr. L. I. Wallick and Mr. E. H. Titus to share fifty-fifty in the result of either action after deducting any and all expenses, in other words Mr. Titus agrees to divide with Mr. London I. Wallick the net amt. he may receive if his suit alone is prosecuted, and Mr. L. I. Wallick agrees to divide in the same way if he has to prosecute his.

Edward H. Titus. London I. Wallick.

[fol. 148-6] SUPREME COURT, NEW YORK COUNTY

[Same title]

INTERLOCUTORY JUDGMENT

The above named, Edward H. Titus, the plaintiff in this action, having appealed to the Appellate Division of the Supreme Court, First Department, from a judgment of the Supreme Court, New York County, entered in the office of the Clerk of the County of New York on January 3rd, 1927, dismissing his complaint on the merits and granting judgment to the defendant against the plaintiff in the sum of Two hundred forty and 82/100 ($240.82) Dollars costs, and said appeal having been argued and said Appellate Division of the Supreme Court, First Department having by an order dated December 2nd, 1927, and filed on December 19th, 1927, ordered the reversal of said judgment with costs, and granting judgment to the plaintiff with costs, and [fol. 148-7] said order having been transmitted by said Appellate Division of the Supreme Court, First Department and filed herein on the 22nd day of December, 1927, and the said order of December 2nd, 1927, having been resettled by the Appellate Division of the Supreme Court,

First Department by an order dated February 9th, 1928, and filed in the office of the Clerk of said court on the 10th day of February, 1928, and a certified copy of said order having been transmitted and filed herein on the 2nd day of April, 1928, and the costs having been duly taxed in the sum of Seven hundred and 50/100 ($700.50) Dollars;

Now, on motion of Joseph Schultz, attorney for the plaintiff, it is

Ordered, Adjudged and Decreed, that said judgment in favor of the defendant and against the plaintiff, entered in the office of the Clerk of the County of New York on January 3rd, 1927, be and the same hereby is reversed with costs and judgment ordered for the plaintiff with costs; and it is

Further Ordered, Adjudged and Decreed, that the decision and the following findings of fact and conclusions of law in this action made by Honorable Joseph M. Proskauer, Justice of the Supreme Court of the State of New York, dated the 29th day of December, 1926, and entered in the office of the Clerk of New York County on the 29th day of December, 1926, be and the same hereby are in all respects reversed as contrary to the evidence in the case and against the law viz.:

[fol. 148-8] Findings of fact "V," "VI," "VII," "IX," "X," "XIII," "XIV," "XVI," "XIX," "XX," "XXI," "XXII," "XXIII," "XXIV," "XXV," "XXVI" and "XXVIII"; and

Conclusions of law "Second," "Third," "Fourth," "Fifth," "Sixth," "Seventh" and "Eighth"; and it is

Further Ordered, Adjudged and Decreed, that the following findings of fact and conclusions of law as made by the Appellate Division of the Supreme Court of the State of New York, First Department, in its order dated December 2nd, 1927, as resettled by the order dated February 9th, 1928, be substituted in the place and stead of the findings and conclusions herein reversed, viz.:

Findings of fact "1" to "42," inclusive; and

Conclusions of law "I," "II," "III," "IV," "V," "VI," "VII," "VII-A" and "VIII"; and it is

Further Ordered, Adjudged and Decreed, that the defendant, Lou C. Wallick, forthwith transfer and deliver to the plaintiff two hundred and fifty shares of the capital stock of Secor Hotel Company, representing a one-quarter interest therein; and it is

Further Ordered, Adjudged and Decreed, that the defendant, Lou C. Wallick, account to the plaintiff touching the issues, benefits, profits, earnings and income, together with interest from the respective dates when such profits, income or earnings accrued or should have accrued, received by him or for his benefit and to which the plaintiff's said stock should have been or become entitled by reason of its [fol. 148-9] one-quarter interest in and to the property, earnings, profits and income of such corporation since October 27th, 1908; and it is

Further Ordered, Adjudged and Decreed that an account be taken of the earnings of The Secor Hotel Company and of any successor thereof subsequent to October 27th, 1908, and of the sums that have been received by the defendant as dividends or otherwise and particularly with respect to the moneys applicable to the plaintiff's said shares of stock; and it is

Further Ordered, Adjudged and Decreed, that after such accounting such other, further and final decree be made in this action as may be equitable and just, and it is

Further Ordered, Adjudged and Decreed, that the plaintiff Edward H. Titus recover of and from the defendant, Lou C. Wallick, his costs and disbursements as taxed, amounting to the sum of Seven hundred and 50/100 ($700.50) Dollars and that the plaintiff have execution therefor; and it is

Further Ordered, Adjudged and Decreed, that either party to this action shall have leave to apply to this court upon notice for such other and further relief, directions and orders herein as shall be proper within the findings and decree herein made.

Judgment, April 2nd, 1928.

William T. Collins, Clerk.

[fol. 148-10] Supreme Court, New York County

[Same title]

Replying Affidavit of Frank F. Gentsch

State of New York,
County of New York, ss:

Frank F. Gentsch, being duly sworn, deposes and says: That I reside at Cleveland, Ohio, and am an attorney at law,

admitted to practice law in the State of Ohio. That I have been practicing law for thirty years.

I have known London I. Wallick and Lou C. Wallick, his brother, intimately from my boyhood, and while I have been an attorney at law, I have never represented either of them in any legal proceeding, except as hereinafter stated.

I have known E. H. Titus, the plaintiff herein, for twenty years. I knew him first when he was Treasurer of Lord & Taylor, before the opening of the Hotel Secor in Toledo, Ohio.

That after Mr. London Wallick opened or began operation of the Postkeller Restaurant in the Woolworth Building, during almost the entire year of 1927 and up to about February or March, 1928, whenever I came to town, I went to the Postkeller Restaurant, and almost invariably in the evening, I would meet Mr. Titus there. He apparently had been in the habit of dropping in nearly every day.

During this period, I never saw Mr. Titus that he did not immediately begin a discussion of the lawsuit against Mr. Lou C. Wallick. He told me on various occasions that he had an arrangement with London I. Wallick, whereby half the proceeds of the judgment in the action of Titus v. Wal- [fol. 148-11] lick was to go to London after payment of the expenses of the suit. I never knew of the existence of any written agreement until either in November or December, 1928, when on one of my visits, London I. Wallick showed me the original agreement dated November 23, 1925, in Mr. Titus's handwriting. These talks at the Postkeller which I have referred to were had with Mr. Titus and Mr. London Wallick.

When I came down to New York on some other business in either November or December, 1928, London Wallick first told me of this written agreement, and then showed it to me for the first time. He also told me at that time about Mr. Titus having executed an assignment of his interest in the lawsuit against Lou C. Wallick to Titus's brother about thirty days after he had made the agreement of November 23, 1925, with London.

In November or December, 1928, I saw a copy of the assignment from E. H. Titus, the plaintiff, to his brother, which assignment purported to assign the entire interest in the judgment recovered in the action of Titus against Wallick to Walter Titus his brother, and the general purport of

the assignment was that Walter Titus was to pay to himself out of the proceeds of the judgment such sums as he had theretofore or would thereafter advance to E. H. Titus to prosecute the lawsuit against Lou C. Wallick, and after repayment of these sums, the balance was to be paid over to the wife of E. H. Titus by Walter Titus.

In view of the situation which developed from the talk which I had with London Wallick and my knowledge of the subsequent assignment to Walter Titus, I then advised London that in order to properly protect himself under his [fol. 148-12] agreement of November 23, 1925, as against the subsequent assignment to Walter Titus, that it would be necessary for him to either ask for leave to file an intervening petition in the original action or begin an independent suit to subject the judgment in the case of Titus against Lou C. Wallick to the trust created by his agreement of November 23, 1925, and that unless he did so act promptly, he would lose the benefit of the agreement, and some compromise might be made between Titus and Lou C. Wallick, and he would ot get any benefit from his agreement. After discussing the matter somewhat in detail, I called E. H. Titus over the telephone at his home in New Jersey and made an appointment to meet him at the Union League Club on that date at noon. I went to the Union League Club at noon, and met E. H. Titus, and told him that London Wallick had shown me the night before the copy of the written agreement between himself and London Wallick dated November 23, 1925. That I had not known of the existence of the written agreement until the day before, at which time London had also told me that Titus, within thirty days after the date of this agreement with London, had executed an assignment absolute on its face to his brother Walter Titus covering his entire interest in the lawsuit. That in view of that fact and his attempted repudiation of the agreement with London, we wanted then an assignment of an undivided one-half interest in this judgment on the record of the court, for London's protection. Titus said that he meant to play fair with London and he would do all that he had agreed to do, but that he would not make the assignment. I said to him, "The trouble with the situation is, Mr. Titus, that you have made an assignment to your brother subsequent to [fol. 148-13] your agreement with London, which is in fraud of your agreement with London, and we are not going to

trust you any further with that assignment outstanding. If your brother and wife will join in an assignment to London, all right, but if he will not, we have nothing else to do but go ahead with our court action and try to subject the judgment to the trust created by the agreement of November 23, 1925."

Titus refused to have his brother do anything, and refused to do anything himself, so that I told him there was nothing left for us to do then except to institute the suit which we would do. After seeing Mr. Titus, I met Mr. London Wallick at the Hotel Roosevelt and had him have the original agreement of November 23, 1925, photostated and the next day I took a photostat copy of the agreement to Mr. Joseph Schultz's office, at 522 Fifth Avenue.

When Mr. Schultz came in, I gave him my card and told him I was representing Mr. London Wallick. That I had had a talk with Mr. E. H. Titus the day before, at the Union League Club. I detailed that conversation, as hereinbefore set out in this affidavit. That I had with me a photostat copy of the original agreement, which I wanted to give him. That in view of the apparent bad faith of E. H. Titus in executing the assignment to his brother Walter and Titus' refusal to get his brother to join in an assignment to London, that there was nothing left for us to do but begin the action, unless he, as attorney for E. H. Titus, would assist in seeing that London Wallick was properly protected. I offered the photostat copy to Mr. Schultz, but he said he did not want to see it or know anything about it; that when the case [fol. 148-14] came up in the Court of Appeals, he wanted to be able to say that he knew nothing of it. I said to him that if we were not given the proper protection by the assignment, as I suggested, that with the filing of the action against Titus to subject the judgment against Lou C. Wallick to the trust, that the matter would become public property in any event and that whether he wanted to or not, he would know the full content of the agreement. I said to him that I was interested only in one thing and that was the protection of London Wallick, and that if they would not make the assignment and we had to file the original action, that undoubtedly Lou C. Wallick's attorneys would have access to the files, would get a copy of the agreement and that I could imagine very easily what their course of action would be.

I have read the answering affidavit of E. H. Titus, verified the 8th day of March, 1929, which is submitted in opposition to the motion for a new trial herein, and especially that part which relates to myself. I desire to say that I never at any time insisted on any written agreement with either Mr. Titus or his attorney, but what I did insist upon was an assignment of an undivided one-half interest in the judgment against Lou C. Wallick by Titus and his brother Walter, which assignment should also be signed by Mrs. Titus as beneficiary under the assignment made by E. H. Titus to his brother Walter, after the repayment to Walter of sums advanced by him.

Referring especially to the statement at the bottom of page 21 of Mr. Titus's affidavit, wherein he states that he advised me that he felt under no obligation to London Wallick, I desire to say that Mr. Titus never made any such statement, but on the contrary said that he intended to carry [fol. 148-15] out his agreement with London but would not make any assignment of any interest in the judgment.

With reference to Mr. Titus's statement at the top of page 22 of his affidavit, wherein he quotes me as saying that "London is sitting pretty; Lou is frantic to make a deal with him," I say that no such conversation was had and so far as I know there was no communication between the brothers at that time with reference to this lawsuit.

With reference to the concluding words in this paragraph, to wit: "It was bluntly put up to me that London Wallick was willing to join forces with that side which would offer him the better inducement. That is, London was trying to play me against his brother and his brother against me", I desire to say that that statement is unqualifiedly false. No such conversation was ever had either directly or indirectly, or from which any inference of that character could be drawn. I did put it plainly up to Mr. Titus that I was interested only in one thing, that was the protection of London Wallick, and that for his protection I insisted upon the assignment of an undivided one-half interest in this judgment, according to the contract, and nothing else.

Referring to the paragraph in the middle of page 22: "Both London Wallick and his attorney Gentsch in the interview with me described, threatened unless I made a written agreement giving to London a substantial interest in the recovery of this case, London would sell out to his brother, the charge would be made that I had committed perjury in

the trial, which it was suggested would be followed by a motion for a new trial, with the ultimate chance perhaps that the decision would be upset. I was then offered the choice of giving up part of my judgment or taking the [fol. 148-16] chance of losing it all. What was threatened has transpired",—I desire to say, as I have said before, I insisted upon one thing and one thing only, that was an assignment by Titus, his brother and Titus's wife of an undivided one-half interest in the judgment, as called for by the agreement of November 23, 1925. Nothing was said at any time about London selling out to his brother either directly or indirectly, but as stated before, I did say to Titus that if we were compelled to file the action against him to subject the judgment to a trust, the records in the case would become public property and I assumed as a matter of course that Lou C. Wallick's attorneys would see a copy of the agreement and would act accordingly. The subject of a new trial was not discussed of the case of Titus against Lou C. Wallick, except as above stated, that I presumed that Lou C. Wallick's attorneys would act, having knowledge of the existence of the agreement. There was no threat made of any charge against Titus for perjury unless he signed the written agreement, as stated in Titus's affidavit, but I did say that I had read over the record very carefully and I thought that in view of the agreement with London dated November 23, 1925, and in view of Titus's numerous statements to me as to the substance of his agreement with London, that he, Titus, had committed perjury in his testimony before Judge Proskauer.

With reference to the concluding sentence in the first paragraph on page 32 of Titus's affidavit, "The language used by Mr. Gentsch, London Wallick's Ohio attorney, brought on here for the express purpose of making a deal with London was that 'London is sitting pretty' ", I desire to say that in the first place I was not brought on here by London for any purpose. I came down here on private [fol. 148-17] business of my own and what London told me at that time came as a result of this business trip of mine and nothing else. I have stated heretofore just what the conversation had with Mr. Titus was, and I have covered that fully. I made no effort at any time to force Titus to make any deal with London Wallick. My efforts were simply to have Titus fulfill his obligation to London I. Wallick, as shown by the agreement of November 23, 1925, and

to have him accordingly, in view of the assignment to his brother Walter Titus and to his wife, as beneficiary thereunder, give to London I. Wallick a proper and adequate protection under his agreement.

Further, I desire to say that up to this time I have never had any conversation with Lou C. Wallick or with any of his attorneys upon the subject matter of the Titus suit, and knew nothing of the status of the case, except as I got it in an imperfect way from London Wallick. I did see Lou C. Wallick and his attorney, James F. Donnelly, in the month of January, 1929, and I delivered to James F. Donnelly when I did see him the photostat copy of the agreement of November 23, 1925, which I offered to Mr. Schultz.

I have no interest in what Lou C. Wallick may do in protecting his rights and make this affidavit disinterestedly.

Frank F. Gentsch.

Sworn to before me, this 9th day of March, 1929. Samuel Michelman, Notary Public, Kings County. Kings Co. Clerk's No. 705, Reg. No. 9306. N. Y. Co. Clerk's No. 693, Reg. No. 9474. Term expires March 30, 1929.

[fol. 148-18] OPINION OF THE COURT

CITY AND COUNTY OF NEW YORK, ss:

Joseph Schultz, being duly sworn, deposes and says that he is an attorney and counsellor-at-law and attorney for the defendant in the above entitled action.

That the following is the opinion of the court rendered upon the within motion:

By MR. JUSTICE LOUIS A. VALENTE:

Titus v. Wallick—This is an application by defendant for a new trial on the ground of newly discovered evidence. [fol. 148-19] The plaintiff in the action sued for the recovery of 250 shares of the Secor Hotel Company of Toledo, Ohio, being one-quarter of the entire issue of the stock, which he claimed defendant was withholding from him. He also asked for an accounting of the profits appertaining to those shares. As a result of the trial in equity his complaint was dismissed, the court finding as a fact that he was

not the owner of the stock claimed. Upon appeal the Appellate Division reversed the judgment, holding that the testimony of the plaintiff was supported by disinterested witnesses and documentary proof. Judgment was directed for the plaintiff and a referee appointed to take the account. Thereafter, and while the reference had proceeded at some length, defendant discovered certain evidence which led him to present the matter to the grand jury, with the result that plaintiff was indicted for perjury. Defendant then made this motion for a new trial on the ground specified. The issues at the trial were very closely contested and were determined solely on issues of fact. The defense of the Statute of Limitations played no part in the determination of the case. Plaintiff's claim arose out of a certain transaction involving the starting of a hotel enterprise in Toledo by defendant Lou C. Wallick and his brother, London I. Wallick, in 1906. The Secor Hotel Company was established by them in order to operate a hotel in Toledo. As a condition to obtaining the lease, they bound themselves to install furniture free of lien upon the property. Plaintiff went on their bond in the amount of $25,000 and as treasurer of Lord & Taylor assisted them in obtaining furniture on credit terms, to carry out their obligation. The brothers each deposited the entire stock issue of the Secor [fol. 148-20] Hotel Company with Lord & Taylor as collateral, each depositing a certificate of 375 shares owned by them and another certificate of 125 shares each, made in the name of plaintiff, which certificate was made subject to the prior rights of Lord & Taylor to hold same as collateral. This transaction occurred in 1908. In 1911 the Wallicks desired to satisfy the claim of Lord & Taylor. Plaintiff, who by that time had resigned as treasurer of Lord & Taylor, wrote a letter to that firm instructing them to release the 250 shares held in his name upon the satisfaction of their claim, and at or about that time he sold, transferred and assigned all his right, title and interest in the 250 shares to Elmer Davis, who was the personal attorney of Lou C. Wallick. He claims that this sale, although absolute in form, was made at the request of the Wallicks, who desired to raise a loan to satisfy the indebtedness to Lord & Taylor, and with a further understanding that this stock would be held in trust for him. Nothing was said to Davis about such a trust and no claim apparently

was asserted by plaintiff until 1925, when he made formal demand for 250 shares, and upon refusal thereof, the action was instituted. He explains his reason for the delay by the fact that he had no reason to believe that Lou C. Wallick would repudiate the alleged trust, and that the first suspicion of defendant's repudiation was in 1923, when he heard him assert to an internal revenue agent that the plaintiff had no interest in the stock of the Secor Hotel Company. Plaintiff rests his claim upon his own testimony and also upon certain admissions alleged to have been made by defendant to witnesses Ashdown, Stilliger and Virtue, that plaintiff had an interest in the hotel. Some of these admissions were alleged to have been made after 1911, [fol. 148-21] when the assignment was made. He also rests his claim upon certain documentary evidence, namely, the fact that the stock certificates were actually made out in his name, and upon the further evidence that when London Wallick sold his interest to his brother only 375 shares were transferred by him, although, if London was a half-partner, so to speak, the amount mentioned should have been 500 shares. Defendant insists that the insert of this reference to 375 shares in the papers was only a casual one, and the actual intent was that London should sell his entire half interest. The claim of the defendant as to plaintiffs status in the corporation is that the stock issued to plaintiff was for the purpose of making him a buffer between the two brothers; that when Lord & Taylor was paid it was the intention of the parties that the stock be released by the plaintiff, and he actually so released it in 1911. Defendant further points to the conduct of plaintiff in never asserting any claim thereafter, in actually borrowing money from him and giving him notes therefor and in securing an indebtedness to defendant by getting his wife to execute a mortgage. The documentary evidence in the case is not necessarily so clear as to give rise to only one inference. In the absence of the oral testimony much of it is ambiguous and subject to different interpretations. The chief issue in the case was whether the stock had ever been issued to plaintiff unconditionally, as plaintiff claims, or merely as a buffer between the two brothers. London Wallick appeared as witness for plaintiff on rebuttal and repudiated the buffer theory. In thus testifying London distinctly stated that he was hostile both to his brother and to the

plaintiff because he had not been fairly treated by either. [fol. 148-22] Balancing these hostilities, it would be possible to draw the inference that London was an impartial witness. If the buffer theory was untrue and plaintiff was unconditional owner in 1908 of the 250 shares, it would require considerable explanation to show why without any consideration he surrendered the stock unconditionally to Davis, and his explanation that he gave up the stock upon the implied understanding testified by him would then become very plausible. At the trial the plaintiff was confronted with a letter which he had written to London Wallick on January 17, 1926, after the litigation had been instituted and before the answer had been served in which he said: "* * * I think we can beat Lou. I don't see how we can help it, but you want to bear in mind that through the trial our interests are single. You understand what I mean and I consider it rather important * * *." When questioned about this letter he insisted that he had made no deal with London Wallick and the latter had no interest whatsoever in the litigation and that he had made no arrangements with London whatsoever. On or about January 19, 1929, London, apparently having made peace with his brother, delivered to him or his representative the following letter, or agreement, as it is called: "The Roosevelt. Agreement made between London I. Wallick and E. H. Titus, November 23rd, 1925, as regards the prosecution of the claim of E. H. Titus against Lou C. Wallick for an accounting for 250 shares of stock of Secor Hotel Co., Toledo, Ohio. Mr. E. H. Titus agrees to prosecute his claim and if Mr. Lou C. Wallick in his answer denies same, then Mr. London I. Wallick agrees to prosecute his claim against Lou C. Wallick for obtaining a contract of sale of his holdings or un- [fol. 148-23] der a misrepresentation of the facts. Both Mr. L. I. Wallick and Mr. E. H. Titus to share fifty-fifty in the result of either action after deducting any and all expenses; in other words, Mr. Titus agrees to divide with Mr. London I. Wallick the net amount he may receive if his suit alone is prosecuted, and Mr. L. I. Wallick agrees to divide in the same way if he has to prosecute his. Edward H. Titus, London I. Wallick." It is this letter which apparently forms the basis for the indictment of the plaintiff for perjury. We are not concerned here with the question of the guilt of the plaintiff, who of course is presumed to be innocent, and who on the presented facts may not even

be technically guilty of the crime of perjury. It may even be that the agreement was abrogated, as plaintiff claims, before the trial, and plaintiff was technically correct in saying that he had no deal with London. On the other hand, the probative value of the new testimony is to be determined at the trial. The only question here is whether it is of such a material nature that if proved to be true it will probably change the result. While it is true that ordinarily a new trial will not be granted if the proposed new evidence is merely of an impeaching character, the rule must be molded in relation to the particular circumstances where the interests of justice are involved (Frohlich v. Zeltzer, 185 App. Div., 103). An illustration of testimony of an impeaching character which would not be a ground for a new trial is found in the proposed new testimony of one of the witnesses, Stillger, who now swears that at the time of the trial plaintiff was indebted to him in a sum of money, from which the inference is to be drawn that his testimony in favor of plaintiff was prompted by self-interest and [fol. 148-24] that he was therefore not a truly disinterested witness. He does not, however, change front and say that he swore falsely at the previous trial. Such testimony, of course, would hardly have any material bearings on the result and would scarcely be a ground for granting a new trial. On the other hand, the proposed testimony showing that plaintiff and London Wallick had an agreement to share in the proceeds of the litigation goes to the very heart of the case. The Appellate Division stressed the fact that London Wallick testified in plaintiff's favor. His testimony was to the effect that the transfer to plaintiff of 250 shares in 1908 was not in the nature of a buffer arrangement. If this testimony is eliminated it strengthens the position of the trial justice below in dismissing the complaint on the merits. It is true that no affidavit of London Wallick is presented by defendant, nor is it proposed by the latter to call him as a witness. But London was plaintiff's witness, not defendant's. If he is eliminated or his testimony as to the buffer arrangement is discredited by conclusive evidence of his personal interest in the litigation in favor of the plaintiff, then it may well be that the balance in this closely contested case would probably preponderate in favor of the defendant. It is true that various inferences may be drawn from the agreement, drawn by a layman, as to its meaning. It may even be that the arrangement was not

a conspiracy in the real sense of the word but one conclusion is irresistible, and that is that if such agreement existed at the time of the trial that London Wallick had a motive of self-interest to testify in favor of the plaintiff and that the latter's testimony lacked the quality necessary to entitle it to preponderate. I am therefore of the opin- [fol. 148-25] ion that the interests of justice require the granting of the motion for a new trial. But in deciding thus it seems proper to make provision for payment by the defendant of the referee's fees and the referee's stenographic minutes as a condition, in accordance with the rule in the Matter of Ryan (70 Hun, 149, aff'd on opinion below, 141 N. Y., 550). Settle order.

Joseph Schnitz.

Sworn to before me this 12th day of June, 1929. Franklin Ellenbogen, Notary Public. Bronx Co. Cl'k No. 40. N. Y. Co. Cl'k No. 131 Reg. No. 1E95. Kings Co. Cl'k No. 19 Reg. No. 1073. Commission expires March 30, 1931.

[fol. 148-26] At a Special Term, Part V, of the Supreme Court held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City, County and State of New York, on the 29th day of December, 1926.

Present: Hon. Joseph M. Proskauer, Justice.

EDWARD H. TITUS, Plaintiff,

against

LOU C. WALLICK, Defendant

JUDGMENT

The issues in this action having been regularly brought on for trial before Mr. Justice Joseph M. Proskauer, at a Special Term of this Court, held on the 15th, 22nd and 23rd days of November and the 7th day of December, 1926, at the New York County Court House, in the Borough of Manhattan, City of New York, and the plaintiff having appeared by Wallace R. Foster, his attorney, and the defendant having appeared by Lyman E. Warren, his attorney, and

Edmund L. Mooney, of counsel, and the Court having heard the allegations and proofs of the parties, and after due [fol. 148-27] deliberation having duly made and filed its decision on the 29th day of December, 1926, containing a statement of the facts and the Conclusions of Law thereon, and directing final judgment as hereinafter provided, and the costs of the defendant having been duly adjusted at Two hundred Forty and 82/100 Dollars.

Now, on motion of Lyman E. Warren, attorney for the defendant, it is

Ordered, Adjudged and Decreed, that plaintiff did not at any time acquire the beneficial ownership in 250 shares of the capital stock of the Secor Hotel Company of Toledo, Ohio, mentioned in the complaint; and it is further

Ordered, Adjudged and Decreed, that the written assignment executed and delivered by plaintiff on or about December 1, 1911, whereby plaintiff assigned to Elmer E. Davis of Toledo, Ohio, all plaintiff's right, title and interest in and to Certificates Nos. 1 and 7 of the capital stock of The Secor Hotel Company of Toledo, Ohio, said certificates being for 125 shares each, was not induced by any fraud or deception on the part of defendant nor by any representation by defendant to plaintiff that plaintiff should retain the beneficial ownership of said stock, nor did defendant then or thereafter promise to return said stock to plaintiff; and it is further

Ordered, Adjudged and Decreed, that the complaint be and the same hereby is dismissed on the merits; and it is further

[fol. 148-28] Ordered, Adjudged and Decreed, that the defendant recover of the plaintiff the sum of Two hundred forty and 82/100 Dollars, costs and disbursements.

Enter.

J. M. P., J. S. C.

William T. Collins, Clerk.

[fol. 148-29] EDWARD H. TITUS—FOR PLAINTIFF—CROSS

Q. Let me read it to you. "But you want to bear in mind"—I think I did not read enough for you to understand the context—"I do not see how we can help it, but you want to bear in mind that through this trial our interests are

single. You understand what I mean." What did you mean?

[fol. 148-30] A. I mean that in this particular trial, I am only one interested in it.

Q. And that you are going to swear to that and he is going to swear to that, that is what you meant?

A. I don't know what he (London I. Wallick) is going to swear to, but I am going to swear to it because it is a fact.

[fol. 148-31] OPINION

Titus v. Wallick.—In 1906 Wallick Brothers (composed of the defendant and his brother, London Wallick) were negotiating for the lease of a hotel to be erected in Toledo, Ohio. They had one Clauss as their joint adventurer in the proposed business. Agreements were made between them and the Commonwealth Building Co., the owners of the site of the proposed "Secor" Hotel, which required the lessees to install, free of lien, furniture to the value of $125,000 and required Wallick Brothers and Clauss each to give a bond in the sum of $25,000 to insure their respective obligations so to install one-half of the required furniture. Wallick Brothers negotiated with Lord & Taylor (of which the plaintiff was treasurer) to supply their one-half of the furniture. Incident to these negotiations the plaintiff bound himself as indemnitor on a surety company bond for $25,000, guaranteeing this obligation of Wallick Brothers. Plaintiff claims that it was orally agreed that he should have beneficially for himself one-quarter of the stock of a corporation to be formed to take over the lease in consideration of his assuming this obligation as indemnitor. On July 24, 1906, defendant wrote to plaintiff: "Enclose please find the article of agreement, properly signed by my brother and myself; also copy of the bond." This was enclosed in a letter reading: "To confirm the agreement entered into today between L. C. & L. I. Wallick * * * and Edward H. Titus, we agree to place * * * $33,000 worth of the Cadillac Hotel Co. stock in your possession to hold * * * until we * * * pay to Lord & Taylor $18,000 amount [fol. 148-32] now due the (for Cadillac Hotel purchases) and then * * * $25,000 * * * at which time Edward H. Titus will release our stock and remain on our bond until the furniture is installed in the new Secor Hotel. The

$25,000 to be applied on account of the purchase price of the furniture for the new hotel." Defendant contends that this corroborates his version of the transaction that a block of $25,000 worth of stock of Sector Hotel Co., subsequently transferred to Titus, was merely security to Titus against his liability as indemnitor. Before the actual operations were begun Lord & Taylor took the position that they preferred to have Wallick Brothers alone act as lessees of the hotel; the Wallicks bought out Clauss; a new lease was made directly to Wallick Brothers and the bond upon which Titus was indemnitor thus became nugatory. In 1908 Wallick Brothers caused to be formed the Secor Hotel Co., which took over the lease. On October 27, 1908, the defendant and his brother, London Wallick, each indorsed and delivered to Lord & Taylor as security 375 shares of the Secor stock and each indorsed and delivered two certificates for 125 shares each to the plaintiff, with a memorandum that they were "subject to the rights of Lord & Taylor * * * as collateral security * * * and I hereby instruct Lord & Taylor to deliver said certificate to said E. H. Titus whenever the above-mentioned indebtedness of Wallick Brothers * * * has been fully paid." The Cadillac stock was thereupon returned to the Wallicks. The building and furnishing of the hotel then proceeded to completion and a [fol. 148-33] large indebtedness accrued to Lord & Taylor. The plaintiff reported at a finance committee meeting of that corporation on March 30, 1910, "that Wallick Brothers had sold the Cadillac Hotel * * * and would pay up the Cadillac Hotel account early in April and also make a substantial reduction on account of the Secor debt." In July, 1910, Titus resigned his office in Lord & Taylor. The Secor Hotel account at that time showed an indebtedness of about $110,000. About November 16, 1911, plaintiff loaned to the defendant $25,000 personally, which was used to reduce the Lord & Taylor account and which was subsequently repaid by the defendant to the plaintiff. He also wrote a letter to Lord & Taylor directing them to release the 250 shares of Secor stock, and on December 1, 1911, the plaintiff formally assigned his interest in the stock to Elmer E. Davis, who was the personal attorney for the defendant and who bought the debt from Lord & Taylor for the defendant's account. The transaction took this form rather than that of payment, because of certain difficulties between the defendant and his brother London. It is the plaintiff's

contention that prior to the time he transferred this stock to Davis he was told by defendant that defendant desired to use the stock as security for a loan, with the proceeds of which he intended to pay Lord & Taylor, and that the stock would remain beneficially the property of the plaintiff. This action is brought to enforce this alleged trust. The defendant categorically denies any such arrangement and claims that the stock was transferred because the debt was paid, [fol. 148-34] all liability on Titus's part cleared up, and that Titus had no beneficial interest in the stock. Davis (whom I accept as a credible witness) had no knowledge whatever of any trust arrangement, and testified that the only transaction between him and Titus was the absolute transfer of these 250 shares. On November 13, 1913, London Wallick sold to the defendant all his interest in the Secor Hotel, which was described as "his entire holdings consisting of 375 shares." The plaintiff argues from this that the Wallicks considered that each one of them owned beneficially only 375 shares and that, therefore, the remaining 250 shares, making up the total capital of 1,000 was inferentially the property of plaintiff. Plaintiff did nothing whatever to assert or enforce his claim to this stock by legal process until 1925. Meanwhile he was evidently in dire financial need. He frequently borrowed from the defendant comparatively small sums of money. A statement was prepared showing the amount which plaintiff owed defendant, and in 1921 plaintiff gave defendant a note for this amount. Subsequently, in 1922, a further statement of plaintiff's indebtedness to defendant was prepared, and this indebtedness was paid by the conveyance by plaintiff's wife of certain land in New Jersey to the defendant. The first time the plaintiff claims he asserted his right at all was in 1923, when defendant applied to plaintiff for some information to assist him in adjusting his income tax returns with the government inspectors. Plaintiff claims to have stated on that oc- [fol. 148-35] casion that he would give no information because the Secor stock was a sore spot with him, and curiously enough continues to state that "it had been a sore spot with him ever since it was issued:" The two vital questions in the case are the nature of the transaction by which the stock was originally transferred to the plaintiff in 1908 and the nature of the transaction by which the plaintiff re-transferred the stock of Davis in 1911. Both are questions of fact upon which the plaintiff must sustain the burden of proof.

Apart from the question of the Statute of Limitations, this is a stale claim. There is a presumption of fact against the plaintiff from the mere delay of fourteen years in bringing this suit, and this presumption is peculiarly strong in a court of equity (United States v. Bee, 17 Fed., 26, 38, aff'd 127 U. S., 338; Kellogg v. Kellogg, 169 App. Div., 395, aff'd 204 N. Y., 597; Conkling v. Weatherwax, 181 N. Y., 258). The probabilities against the plaintiff are further increased by the admitted circumstance of his financial distress during this long interval. It is difficult to grasp why, if he owned what was concededly a valuable right, he should suffer during all these years in inconveniences of money shortage, put off as he says by vague promises of the defendant. Potent circumstances against the plaintiff also are the facts that, despite this very large claim against the defendant, he gave his promissory note to the defendant for the money loaned and actually participated in the transfer of land to the defendant in payment of admitted obligations. The giving of the note itself "is prima facie evidence of an ac-[fol. 148-36] counting and settlement of all demands between the parties" (Sheldon v. Sheldon, 133 N. Y., 1). The specific evidence of the two crucial transactions of 1908 and 1911 respectively must be examined in the light of these general considerations. The agreement claimed by the plaintiff to have been made in 1906 to the effect that he was to have these 250 shares of stock when the corporation was organized rests practically upon his unsupported testimony as to conversations that occurred twenty years ago. While technically his agreement to indemnify the bonding company was good consideration for the promise, it cannot be overlooked in viewing the subsequent conduct of the parties that his liability as indemnitor was almost immediately terminated and that when he received this stock in 1908 all the parties knew that his signature of the indemnity agreement had become a mere form. The letter of July 24, 1906, above quoted (the only written record of the transaction), contains the significant statement that when $25,000 has been paid to Lord & Taylor "Edward H. Titus will release our stock and remain on our bond until the furniture is installed in the new Secor Hotel." The inference is very strong that this related not only to the Cadillac Hotel Company stock specifically mentioned in this letter, but to the $25,000 par value of stock that was to be given. In the Cadillac Hotel Company stock specifically mentioned in the letter no one claims that

Titus ever had any interest. Neither plaintiff nor defendant suggests that Titus personally had any stock of the [fol. 148-37] Cadillac Hotel Company which he could release. The letter evidently meant that Titus was to release $25,000 of stock which he was to receive as his indemnity when $25,000 had been paid on the account to Lord & Taylor. This inference is strengthened by the circumstance that when the corporation had been formed in 1908 and the Secor Hotel Company stock was given to Lord & Taylor and Titus, the Cadillac Hotel Company stock was surrendered. Coming to the 1911 transaction this rests upon the unsupported testimony of the plaintiff as to conversations occurring fifteen years ago. In the earlier transactions the parties had, even though with ambiguous informality, left some written record of what they were doing. It is difficult to believe that the plaintiff would surrender this valuable stock, not to the defendant personally, but to the defendant's lawyer, with no written record of his retention of the beneficial ownership of the stock, if such he had. It is also significant that the reason which plaintiff gives for his surrender of the stock with retention of beneficial ownership never in fact existed. Davis testifies that no loan was ever procured on this stock as collateral and that the certificates remained in his possession. Against these considerations there is the agreement between the Wallicks, which must be regarded as an admission that London Wallick's ownership was but 375 shares instead of 500 shares. Like all admissions it is subject to explanation. The figures "375" appear in a typewritten line; the figures "500" representing the number of Cadillac Hotel Company shares [fol. 148-38] sold were written in in ink. The transaction between the Wallick Brothers was evidently closed in Toledo and some lawyer in New York prepared this agreement. No one is able to tell after this lapse of time who the lawyer was. The paternity of this instrument is shrouded in darkness. The fact was that London Wallick was expressly selling all he had. There was one certificate of 375 shares still physically remaining with Lord & Taylor because they had refused physically to surrender it to Davis without London Wallick's authority, though they had agreed to hold it subject to the lien of the debt which they transferred to Davis. It seems to me reasonable that the parties focused their mind on this 375-share certificate, knowing that the defendant had already procured the 125-

share certificate which London Wallick had transferred in 1908 to Titus. There are also certain general admissions testified to by defendant's witnesses to the effect that the defendant at various times stated that Titus owned his stock. I do not accept this testimony as accurate. It consists merely of the recounting of casual statements made to witnesses who had no interest in the matter at all and no reason for knowing the particular import of the words used by the defendant. On the whole case I cannot find that the plaintiff has sustained the burden of proof. The conclusions which I have thus reached upon the facts rendered unnecessary any exhaustive consideration of the defense of the Statute of Limitations. Assuming that the ten-year statute applies the statute began to run where the defendan's obligation to return the stock arose. This obligation [fol. 148-39] arose within a reasonable time after the stock was delivered to him, bearing in mind the purpose of the delivery (Gilmore v. Ham, 142 N. Y., 1). Treadwell v. Clark (190 N. Y., 51) is clearly distinguishable because there the pledgee was under no duty until after tender of the debt, and hence the statute did not begin to run until the facts constituting the wrongful resale by the pledgee were ascertained. The interval between the time of delivery of the stock and the commencement of the action was about fourteen years. I should find that two years would be amply reasonable for the return. I think Gilmore v. Ham (142 N. Y., 1) is conclusive against the plaintiff on the defense of the Statute of Limitations. Judgment for the defendant. Settle decision and judgment on notice returnable not later than December 28.

[fol. 148-40] EXCERPTS FROM EXHIBIT 2

[fol. 148-41] At a Special Term Part III of the Supreme Court of the State of New York, held in and for the County of New York, at the Court House thereof, Pearl and Centre Streets, in the Borough of Manhattan, City of New York, on the 20th day of April, 1933.

Present: Hon. Irwin Untermyer, Justice.

[Same Title]

ORDER APPEALED FROM

The plaintiff having on March 16th, 1933, moved to vacate and set aside the report of Hon. Edmond M. McCarthy, the

[fol. 148-42] referee herein, dated January 27th, 1933, and filed in the Office of the Clerk of the County of New York on February 24th, 1933, and for such other and further relief in the premises as may be proper.

And the defendant on March 20th, 1933, having moved to confirm the decision and report of the Referee and for a final judgment in his favor, and for an extra allowance, and both motions by consent of the attorneys for the respective parties having been brought on at the same time before me on March 22nd, 1933, and having been argued on the said day,

Now, upon reading and filing the plaintiff's notice of motion dated March 16th, 1933, and the affidavit of Thomas I. Sheridan, duly verified March 17th, 1933, in support thereof, and the defendant's notice of motion dated, March 20th, 1933, and the affidavit of James F. Donnelly, verified March 20th, 1933, in support thereof, and upon reading and filing the Referee's report dated January 27th, 1933, and filed herein on February 24th, 1933, the original transcript of the stenographer's minutes and the exhibits, and upon all the proceedings heretofore had herein, and particularly the judgment filed herein on March 6th, 1932, and the order of reference, dated May 11th, 1932, and due deliberation having been had, and now upon filing the opinion of the Court, it is

Ordered, that the plaintiff's motion to vacate and set aside [fol. 148-43] the report of the Referee, be and the same is hereby granted and the said report is in all respects vacated and set aside, and it is further

Ordered, that the defendant's motion to confirm the Referee's report and for final judgment in his favor, and for an extra allowance, be and the same is hereby in all respects denied, and it is further

Ordered, that the issues as laid down by the judgment filed herein on March 16th, 1932, and the order of reference, dated May 11th, 1932, be recommitted to Hon. Edmond M. McCarthy, the Referee herein, to proceed in accordance with the terms of the judgment entered herein on March 16th, 1932, and the order of reference dated, May 11th, 1932, and to take an account of the sums, if any, distributed as earnings of Secor Hotel Company and of any successor thereof subsequent to October 27th, 1908, and of any sums that have been received by the defendant as dividends or otherwise, and particularly with respect to the moneys, if any applica-

ble to the plaintiff's one-quarter interest in said Secor Hotel Company, and it is further

Ordered, that upon said accounting the defendant Lou C. Wallick, account to the plaintiff touching the issues, benefits, profits, earnings and income, if any together with interest from the respective dates when such profits, earnings or income were distributed and were received by him or for his benefit, and to which the plaintiff's said stock should have [fol. 148-44] been or become entitled by reason of his one-quarter interest in and to the property, earnings, profits or income of said Secor Hotel Company, since October 27th, 1908, and it is further

Ordered, that either party to this action shall have leave to apply to this Court upon notice for such other and further relief, directions and orders herein as shall be proper, within the findings and decree heretofore made in this action, and it is further

Ordered, that the said Referee shall make all just allowances to the parties as between themselves and to report what on the balance of the said account shall appear to be due from the defendant to the plaintiff, and it is further

Ordered, that the Referee herein be and he hereby is directed to proceed in accordance with the opinion of this Court as announced in the determination of the respective motions, and it is further

Ordered, that all questions of cost and allowances be reserved until the entry of a final judgment herein.

Enter.

I. U., J. S. C.

[fol. 148-45] REFEREE'S REPORT

50. That there is no sum of money due in this proceeding from the defendant Lou C. Wallick to the plaintiff, Edward H. Titus.

[fol. 148-46] OPINION OF THE COURT

CITY AND COUNTY OF NEW YORK, ss:

Samuel D. Jones, being duly sworn, deposes and says that he is an attorney and counsellor at law and attorney for the defendant in the above entitled action, having been substituted in the place and stead of Olvany, Eisner & Donnelly, Esqs. That the following is the opinion of the court rendered upon the within motions.

UNTERMYER, J.:

On this motion the court is not at liberty to consider the question whether the interlocutory judgment and the order [fol. 148-47] of reference made pursuant thereto should have been as broad in scope as they are. The court is only concerned with the question whether they have been executed in accordance with their terms, for both are conclusive here. I am of opinion that the interlocutory judgment herein and the order of reference, especially when considered in the light of the earlier proceedings in this case, required the referee to proceed further than he did. Both the judgment and the order of reference provide that the referee shall "take an account of the sums, if any, distributed as earnings of the Secor Hotel Co., and of any successor thereof subsequent to October 27, 1908, and of any sums that have been received by the defendant as dividends or otherwise and particularly with respect to the moneys, if any, applicable to the plaintiff's one-quarter interest in said Secor Hotel Company". It further provides "that the said Referee shall make all just allowances to the parties as between themselves and report what on the balance of the said account shall appear due from defendant to the plaintiff". Not only are these provisions on their face such as to require the account to be so taken as to ascertain any amount diverted from the Secor Hotel Co. by the defendant which would otherwise be applicable to the plaintiff's one-quarter interest therein, but the fact that the Appellate Division resettled its order of reversal to include those provisions despite objections then urged by the defendant, precludes the defendant from successfully interposing the same objections again. Moreover there are reasons which may well have inclined the court to grant such broad relief. The fact [fol. 148-48] that the defendant at the present time is the owner of practically all the stock of the Secor Hotel Co. not owned by the plaintiff, that the corporation has no assets and is no longer in business, that apparently in some instances at least the defendant has dealt with the corporate property as if it were his own—all these considerations no doubt influence the court to accord relief commensurate with the exigencies of the situation. In his report the referee states: "there is considerable evidence here which, if this was a stockholder's action for misuse of funds of the Hotel Company by the defendant and others, would indicate that the defendant should repay to the Hotel Company substan-

tial sums". While the referee found that the defendant did not receive "any moneys as dividends" or any sums distributed "as earnings of the Secor Hotel Company," the record reveals that the defendant received sums which, in view of the broad scope of the reference ordered, might well have been found to be "applicable to the plaintiff's one-quarter interest in said Secor Hotel Company". The referee declined to pass upon these items, however, stating that none of them was "an issue in this action." He concluded that the plaintiff could not "in this proceeding obtain a judgment against the defendant personally for his claimed proportionate share of the funds, assets and earnings of the Secor Hotel Company" so diverted, but that the plaintiff's remedy was limited to a derivative suit on behalf of the corporation. Under the judgment and order of reference it [fol. 148-49] seems clear that the referee should not thus have limited the scope of the accounting, especially since the Appellate Division had previously expressly overruled the defendant's objections to the broad relief accorded to the plaintiff. I consider, therefore, that the interlocutory judgment and the order of reference require an accounting here which shall determine any assets or funds of the Secor Hotel Co. improperly received by the defendant and that, after making all proper adjustments, the defendant be required to account to the plaintiff for so much thereof as may be "applicable to the plaintiff's one-quarter interest in said Secor Hotel Company". If there are creditors of the corporation, that fact can be ascertained on the accounting and proper allowance made. The plaintiff's motion to set aside the report of the referee will accordingly be granted and the defendant's motion to confirm the report of the referee will be denied, and the issues recommitted to the referee for determination in accordance with this opinion and the order to be entered thereon. Settle order.

Dated April 10th, 1933.

I. W., J. S. C.

Samuel D. Jones.

Sworn to before me this 25th day of July, 1933. Irene G. Knott, Notary Public. Queens Co. Cl'k's No. 2971, Reg. No. 7146. N. Y. Co. Cl'k's No. 693, Reg. No. 6K427. Commission expires March 30, 1935.

[fol. 148-50] EXCERPTS FROM EXHIBIT 3

[fol. 148-51] At a Special Term, Part IV of the Supreme Court, held in and for the County of New York, at the County Court House in the Borough of Manhattan, City, County and State of New York, on the 26th of January, 1931.

Present: Hon. Bernard L. Shientag, Justice.

[Same title]

JUDGMENT

The issues in this action having been regularly brought on for trial before Mr. Justice Bernard L. Shientag at a Special Term, Part IV of this Court, held on the 3rd, 4th, 5th and 8th days of December, 1930, at the New York County Court House, in the Borough of Manhattan, City and State of New York, and the plaintiff having appeared by Hartman, Sheridan, Tekulsky & Pecora, Esqs., Mr. Thomas I. Sheridan, of counsel, and the defendant having appeared by Olvany, Eisner & Donnelly, Esqs., Mr. James F. Donnelly, of counsel, and the Court having heard the allegations and proofs of the parties and, after due deliberation, having duly made and filed its decision on the 30th day of January, 1931, containing a statement of the facts and the conclusions of law therein, and directing final judgment as hereinafter provided, and the costs of the defendant having been duly adjusted at $417.20 Dollars ($—).

Now, on motion of Olvany, Eisner & Donnelly, attorneys for the defendant, it is

[fol. 148-52] Ordered, Adjudged and Decreed, that the plaintiff did not at any time acquire the beneficial ownership in two hundred and fifty (250) shares of the capital stock of the Secor Hotel Company, Toledo, Ohio, or in any shares of the capital stock of the said company; and it is further

Ordered, Adjudged and Decreed that the written assignment, executed and delivered by plaintiff on or about December 5, 1911, whereby plaintiff assigned to Elmer E. Davis of Toledo, Ohio, all of plaintiff's right, title and interest in and to certificates numbers 1 and 7 of the capital stock of the Secor Hotel Company of Toledo, Ohio, such certificates being for one hundred and twenty-five (125) shares each, was not induced by any fraud or deception on

the part of the defendant, nor was said assignment executed and delivered because of or by any representation by defendant to plaintiff that plaintiff should retain a beneficial ownership in said stock, nor did defendant at any time then or thereafter promise to return said stock or any part thereof to the plaintiff; and it is further

Ordered, Adjudged and Decreed that the complaint be and the same hereby is dismissed on the merits; and it is further

Ordered, Adjudged and Decreed that defendant recover of plaintiff the sum of $417.39 Dollars ($—) costs and disbursements, and that the defendant have execution therefor.

Enter.

B. S., J. S. C.

Daniel E. Finn, Clerk.

[fol. 148-53] Edward H. Titus—Plaintiff—Cross

Q. As a matter of fact, do you remember making an assignment of the claim in this suit here to your brother within thirty days after the making of this agreement of November 23rd, 1925?

Mr. Sheridan: This is clearly a collateral matter. A lot of objection could have been made to the other questions, but I object to this.

The Court: I will allow it.

Mr. Sheridan: Exception.

Q. Did you make an assignment to your brother of whatever recovery you might make in this cause of action you are testifying about, within a short time after the agree-
[fol. 148-54] ment of November 23rd, 1925?

Mr. Sheridan: Same objection.

The Court: Objection overruled.

Mr. Sheridan: Exception.

A. I don't quite remember, but I did have an agreement with my brother, and it has always been a matter between us.

Q. And after your brother got through receiving certain expenses under that assignment, your wife was to get the balance?

A. No.

Q. There was an assignment to your brother?
A. Yes.
Q. There came a time when London Wallick learned about that assignment, do you remember that?
A. I told him about that assignment and the interest to my wife.

[fol. 148-55] Opinion by Mr. Justice Shientag

In the last analysis the issue in this case is one of credibility. The documentary evidence standing alone is insufficient to determine where the truth lies as between the conflicting contentions here advanced. Varying inferences may be drawn from any one document. Moreover, certain documents offset others so far as probative value is concerned. The force to be attached to the documentary evidence depends upon the credence to be given to the oral testimony which gives meaning and vitality to the writings. That being so, I have reached the conclusion that the plaintiff should not prevail. The nature of the consideration for the alleged agreement; the staleness of the claim; the long delay on the part of the plaintiff in asserting his legal rights without satisfactory or convincing explanation; his suppression of material evidence at the first trial under circumstances amounting to the perpetration of a fraud upon the Court; the admitted uncertainty and weakness of his position indicated by the suppressed agreement; the plaintiff's reaffirmation of that agreement after the first trial, at which it was suppressed on the theory that it had been cancelled; the memorandum of the accountant made in 1910 which strongly tends to corroborate the defendant's view of the transaction--these are some of the circumstances which have influenced me in arriving at my determination. I am not unmindful of discrepancies in the defendant's testimony; of his attempt to overreach his brother in connection with the withdrawal of the collateral; or of the improbability of his story as to what took place at the [fol. 148-55½] meeting with the revenue agents. Characterization of some of the testimony offered on both sides would serve no useful purpose. The plaintiff has the burden imposed upon him by law of establishing his case to the satisfaction of the Court by reliable and trustworthy testimony. That he has failed to do. "A constructive trust is the for-

mula through which the conscience of equity finds expression" (Beatty v. Guggenheim, 225 N. Y. 380, 386). That conscience will not be stirred by evidence uncertain, equivocal and deceptive. Judgment is accordingly awarded in favor of the defendant. Proposed findings of fact and conclusions of law passed upon. Submit decision and judgment on notice on or before January 26.

[fol. 148-56] At a Term of the Appellate Division of the Supreme Court, First Department, held at the Court House in the County of New York, on the 26th day of February, 1932.

Present: Hon. Edward R. Finch, P. J.; Hon. Edgar S. K. Merrell, Hon. James O'Malley, Hon. Henry L. Sherman, Hon. Alfred H. Townley, J. J.

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EDWARD H. TITUS, Plaintiff-Appellant,

against

LOU C. WALLICK, Defendant-Respondent

ORDER OF REVERSAL

The above-named Edward H. Titus, the plaintiff in this action, having appealed to the Appellate Division of the Supreme Court, First Department, from a judgment of the Supreme Court, New York County, entered in the office of the Clerk of the County of New York on February 16th, 1931, dismissing his complaint upon the merits, and granting judgment to the defendant against the plaintiff in the sum of $417.39 costs, and said appeal having been argued by Thomas I. Sheridan, Esq., of counsel for the appellant, and James F. Donnelly, Esq., of counsel for the respondent, on February 9, 1932, and due deliberation having been had thereon, it is unanimously

[fol. 148-57] Ordered and Adjudged, that the said judgment so entered in the office of the Clerk of the County of New York on February 16th, 1931, be and the same is hereby reversed with costs and judgment is hereby granted to the plaintiff in accordance with the findings herein, and it is

Further Ordered, Adjudged and Decreed, that the findings of fact of the defendant numbered V, VI, VII, VIII, IX,

X, XI, XII, XIII, XIV, XV, XVIII, XIX, XX, XXII, XXIV, XXV, XXVI, XXVII, XXVIII, XXIX, XXX, XXXI, XXXII, XXXIII, XXXIV, XXXV, XXXVI, XXXIX, XLI, XLII and XLIV, are hereby reversed and the following findings of fact substituted in their place and stead:

Findings of Fact:

1. That the Secor Hotel Company is a corporation duly organized and existing under the laws of the State of Ohio, having been organized in April, 1908, with a capital stock of 1,000 shares of the par value of $100 each.

2. That the said Secor Hotel Company was organized to operate the Hotel Secor at Toledo, Ohio, and to own a lease thereof and other necessary property incidental to the conduct of the said hotel.

3. That in and during the year 1906, and subsequent thereto, the defendant and his brother, London I. Wallick, were engaged in promoting and arranging to secure a lease of said hotel then building or about to be built, and as such were acting as co-partners.

[fol. 148-58] 4. That the defendant, his brother and one Clauss were offered a proposed lease requiring, among other things, that upon its execution, the defendant and his brother furnished an approved Surety Company bond for $25,000, providing that upon the completion of the said hotel, and not later than August 1st, 1908, the defendant and his brother would install one-half of the necessary furnishings to the said hotel to the extent of $62,500, free of any lien.

5. That during the period from July 1st, 1906, to about July 1st, 1910, the plaintiff was treasurer of Lord & Taylor in the City and State of New York.

6. That at various times during the year 1906 the defendant and his brother negotiated with Lord & Taylor to supply one-half of the $125,000 worth of furnishings required to be installed by them in the said Hotel Secor.

7. That the defendant and his brother requested of the president of the said Lord & Taylor that that corporation indemnify the Surety Company to the extent of $25,000, in consideration of which the Surety Company would ex-

ecute and deliver its undertaking to the Commonwealth Building.

8. That the defendant and his brother attempted to secure a Surety Company bond as required by the said Commonwealth Building Company, but were unable to secure it.

9. That at the request of the defendant and his brother, and with the knowledge, consent and approval of Lord & Taylor, the plaintiff executed an agreement to indemnify [fol. 148-59] the Illinois Surety Company for issuing a bond to the Commonwealth Building Company of Toledo, Ohio, the owners of the proposed hotel, and the said Illinois Surety Company thereupon issued its bond to the said Commonwealth Building Company.

10. That the said bond was accepted by the Commonwealth Building Company and thereafter a lease of the said proposed hotel was made and entered into between the Commonwealth Building Company, as lessor, and the defendant, his brother and the said Clauss, as lessees.

11. That the said Clauss was thereafter eliminated as one of the lessees and a new lease entered into between the Commonwealth Building Company, as lessor, and the defendant and his brother, London I. Wallick, as lessees.

12. That in consideration of plaintiff's indemnifying the said Illinois Surety Company for issuing said bond, the defendant, in behalf of himself, and his brother, London I. Wallick, promised and agreed to issue and deliver to the plaintiff a one-quarter interest in the said hotel, to be represented by one-quarter of the stock of a corporation to be formed to operate the said hotel.

13. That the said Hotel Secor was completed, furnished and open to the public for business on August 1st, 1908.

14. That on October 27th, 1908, the defendant and his brother, London I. Wallick, each endorsed in blank and delivered to the plaintiff a certificate representing 125 shares of the capital stock of the Secor Hotel Company, described [fol. 148-60] in the complaint, and at the same time made, executed and delivered to the plaintiff an instrument in writing, by which, according to the terms thereof, for a full and valuable consideration, they sold, assigned and transferred to the plaintiff 250 shares of the capital stock of the

Secor Hotel Company of Toledo, Ohio, subject to the rights of Lord & Taylor to hold the said stock as collateral security, to secure the payment of an indebtedness existing from the defendant and his brother to the said Lord & Taylor.

15. That the transfer and delivery of the said stock of the plaintiff was made pursuant to and in fulfillment of the agreement of the defendant and his brother to give the plaintiff a one-quarter interest in the said hotel for executing the said indemnity agreement to the Illinois Surety Company.

16. That on or about December 1st, 1911, plaintiff made, executed and delivered to Elmer E. Davis, as agent and attorney for the defendant, an assignment of the said 250 shares of the Secor Hotel Company stock, upon the express representations of the defendant that he required said stock to use to aid him in financing said hotel, and upon the promise of the defendant to return the said stock to the plaintiff, which promise and representations were relied upon by the plaintiff, and the assignment and delivery of the stock was made in reliance thereon.

17. That the said transfer and delivery of the said stock by the plaintiff, at the defendant's request, to Davis, was made without consideration to the plaintiff of any kind or nature.

[fol. 148-61] 18. That the said transfer and delivery of the said stock to Davis was not intended to be a sale or a gift of the said stock to the defendant or Davis.

19. That thereafter the indebtedness of the defendant and his brother to Lord & Taylor for which the said stock had been held as collateral security was fully paid and satisfied and it was freed of and from any lien or claim of Lord & Taylor as pledgee.

20. That any and all loans for which the plaintiff authorized the defendant to use his said stock as collateral have been paid.

21. That the business of the Hotel Secor from 1908 and up to the present time has been highly successful and its earnings have been large and substantial, but in an amount which the plaintiff cannot at the present time state.

22. That the said Secor Hotel Company since from a period shortly after the date of its organization has continuously operated and conducted as the sole lessee of the said hotel known as the Hotel Secor.

23. That the average earnings to the defendant resulting from the operation of the said hotel for a period of at least fifteen years preceding the time of the commencement of this action has annually exceeded the sum of $10,000.

24. That the plaintiff, having implicit confidence in the integrity and reliability of the defendant, and relying upon the representations and assurance of the defendant, and upon his promise and agreement to return and restore the [fol. 148-62] said stock, and for no other reason or consideration whatever, did on or about December 1st, 1911, at the City of New York, execute and deliver to the defendant personally, an assignment of the said stock, which assignment purported to transfer to the said Davis, as agent and attorney for the defendant, the certificate or certificates representing plaintiff's one-quarter interest in the Secor Hotel Company.

25. That the execution of the said assignment to the said Davis was intended to be, and in truth and fact was, for the sole benefit and advantage of the defendant.

26. That upon frequent occasions from about the said December 1st, 1911, to about September 12th, 1923, the plaintiff from time to time talked with the defendant concerning the restoration and return of the said stock, and requested that the same be returned, and that upon such occasions the defendant agreed to restore and return the stock and to give and render a full accounting thereunder to the plaintiff, assuring plaintiff at all such times that the same would be done, but the defendant has wholly neglected and failed to restore or return the said stock to the plaintiff, or to cause the same or the rights thereunder or arising therefrom to be returned or restored, and that neither the said stock nor any rights thereunder have been delivered to or received by or transferred to plaintiff, nor has any accounting whatsoever been rendered, although due demands therefor have been made upon the defendant.

27. That on or about December 15th, 1925, a written demand for the return of the said stock and for an account-

[fol. 148-63] ing thereunder of the moneys accruing to the credit of the aforesaid stock was duly personally served upon the defendant.

28. That the retention by the defendant of the said stock and of the rights therein and thereunder, and his continued promises and assurances to restore and return the same, and to account therefor to the plaintiff was done with intent on the part of the defendant to deceive the plaintiff, to forestall, delay and prevent any action on the part of the plaintiff seeking the recovery of the said stock and rights thereunder, and that the procuring of the execution and delivery of the said assignment to Davis was in furtherance of the defendant's plan to defraud the plaintiff and that such plan of fraud was concealed from this plaintiff until on or about September 12th, 1923, when the plaintiff again asked the defendant for the return of the said stock.

29. That on or about September 12th, 1923, was the first occasion when the defendant, either directly or indirectly, disclosed that he repudiated any claim of the plaintiff in the aforesaid stock, and that occasion was the first time that the defendant claimed or asserted that the plaintiff had parted with any right, title or interest that he had in the said stock, and that was the first time that the defendant claimed that nothing was due to the plaintiff in connection with the said stock.

30. That such discovery by the plaintiff and such knowledge to the plaintiff of the defendant's repudiation of plaintiff's rights in the said stock was made within ten years prior to the commencement of this action.

[fol. 148-64] 31. That the plaintiff had no notice, knowledge or information of the intended retention and appropriation of the said stock by the defendant until on or about September 12th, 1923.

32. That on or about the 15th day of December, 1925, plaintiff made written demand on the defendant that he return to him said shares of stock and account to him for any and all earnings received by the defendant on the said stock and any earnings or profits to which said shares of stock were entitled.

33. That on or about the 18th day of December, 1925, the defendant refused to return said stock or to account for

any earnings or profits received by him on account thereof, or any earnings or profits which might be properly credited to the said stock.

34. That the assignment to the plaintiff of 125 shares each by the defendant and his brother, London I. Wallick, provided that 250 shares of stock thus assigned to plaintiff were to be turned over to him individually after the indebtedness of the defendant and his brother to Lord & Taylor had been liquidated.

35. That the defendant on October 19th, 1908, in a written instrument under seal, agreed with his brother, London I. Wallick, that his beneficial ownership in the stock of the Secor Hotel Company was only 500 shares to 250 shares owned by London I. Wallick, and that this ownership would be equalized.

36. That pursuant to the agreement of October 19th, 1908, the defendant caused 375 shares of the Hotel Secor to be [fol. 148-65] issued to himself and 375 shares to be issued to his brother, London I. Wallick.

37. That the defendant and his brother, London I. Wallick, on November 15th, 1913, admitted in writing that all the stock of the said Secor Hotel Company then owned by London I. Wallick was 375 shares.

38. That on February 3rd, 1910, the defendant stated to one Ashdown, an accountant, who was auditing the accounts and earnings of Lord & Taylor, that the plaintiff and the defendant had a personal transaction outside and beyond Lord & Taylor and that the plaintiff was entitled to an interest in the stock after the indebtedness of the defendant and his brother to Lord & Taylor was satisfied.

39. That at Toledo, Ohio, in November, 1913, London I. Wallick stated in the presence of his brother, the defendant, a Mr. Crane, a Toledo banker, and Anthony E. Stilger, then President of the Chelsea Exchange Bank, New York City, that he, London I. Wallick, was selling his interest in the Secor Hotel to the defendant notwithstanding the fact that the plaintiff owned 250 shares of the capital stock of the company.

40. That the defendant did not then dispute or deny plaintiff's ownership of the said stock.

41. That in 1913, after the defendant purchased the stock from his brother, London I. Wallick, the defendant stated to one Anthony E. Stilger that the plaintiff owned 250 shares of the company's stock.

[fol. 148-66] 42. That the defendant stated to his brother, London I. Wallick, that the plaintiff was to be a beneficial owner of 250 shares of the Hotel Secor stock and not merely a buffer between them.

43. That from the time of the formation of the Secor Hotel Company, the defendant, except for the interest of his brother, London I. Wallick, owned a majority of the stock of the said corporation, was its controlling owner, was its manager and President and exercised entire domination over the said corporation and the hotel that it operated.

And it is Further Ordered, Adjudged and Decreed, that the defendant's Conclusions of Law numbered First, Second, Third, Fourth, Seventh, Eighth and Ninth are hereby reversed and the following Conclusions of Law substituted in place and stead thereof:

Conclusions of Law

I. That by the assignment of the defendant and his brother, London I. Wallick, dated October 27th, 1908, the plaintiff became the beneficial owner of 250 shares of the capital stock of the Secor Hotel Company.

II. That the plaintiff is now the owner of 250 shares of the capital stock of the Secor Hotel Company.

III. That plaintiff was entitled to rely on defendant's promise to return the said stock until such time as the defendant either refused to return it or took some course of action in relation to said stock as to apprise the plaintiff of the defendant's adverse claim of title to said stock.

[fol. 146-67] IV. That there was no legal duty or obligation on the part of the plaintiff to demand the return of the said stock within a reasonable time after the plaintiff transferred it to Davis, the defendant's agent and attorney.

V. That the Statute of Limitations did not commence to run until after a demand on the part of the plaintiff or until a refusal to return the said stock to the plaintiff or notice to

the plaintiff of the defendant's intention to refuse to return the stock to the plaintiff.

VI. That the Statute of Limitations did not commence to run against the plaintiff's claim more than ten years prior to the commencement of this action.

VII. That the Statute of Limitations did not begin to run until knowledge by the plaintiff of the defendant's repudiation of his claim to the stock on September 12, 1923.

VIII. That the defendant, Lou C. Wallick, account to the plaintiff touching the issues, benefits, profits, earnings and income, together with interest from the respective dates when such profits, income or earnings were distributed and were received by him or for his benefit and to which the plaintiff's said stock should have been or become entitled by reason of its one-quarter interest in and to the property, earnings, profits and income of such corporation since October 27th, 1908, and that an account be taken of the sums distributed as earnings of the Secor Hotel Company and of any successor thereof subsequent to October 27th, 1908, and of the sums that have been received by the defendant as [fol. 148-68] dividends or otherwise, and particularly with respect to the moneys applicable to the plaintiff's said shares of stock.

IX. That plaintiff is entitled to judgment against the defendant requiring him to transfer and deliver to the plaintiff 250 shares of the capital stock of the Secor Hotel Company, and to account to him for any and all earnings received by the defendant on the said stock since October 27th, 1908, together with the costs and disbursements of this action.

Let judgment be entered accordingly.
Ent.

E. R. F.

SUPREME COURT, NEW YORK COUNTY

[Same title]

JUDGMENT OF REVERSAL

The above-named Edward H. Titus, the plaintiff in this action, having appealed to the Appellate Division of the Su-

preme Court, First Department, from a judgment of the Supreme Court, New York County, entered in the office of the Clerk of the County of New York, on February 16, 1931, dismissing his complaint on the merits and granting judgment to the defendant against the plaintiff in the sum of $419.37 costs, and said appeal having been argued, and said Appellate Division of the Supreme Court, First De-
[fol. 148-69] partment, having by an order dated February 26th, 1932, and filed the 11th day of March, 1932, ordered the reversal of the said judgment with costs and granting judgment to the plaintiff with costs, and said order having been transmitted by said Appellate Division of the Supreme Court, First Department, and filed herein on the 12th day of March, 1932, and a certified copy of said order having been transmitted, filed herein on the 12th day of March, 1932, and the costs of the plaintiff having been duly taxed in the sum of $1,527.55,

Now, on motion of Hartman, Sheridan, Tekulsky & Pecora, attorneys for the plaintiff, it is

Ordered, Adjudged and Decreed, that said judgment in favor of the defendant and against the plaintiff entered in the office of the Clerk of the County of New York on February 16th, 1931, be and the same hereby is reversed with costs and judgment ordered for the plaintiff with costs, and it is

Further Ordered, Adjudged and Decreed, that the decision and the following Findings of Fact and Conclusions of Law in this action made by Hon. Bernard L. Shientag, Justice of the Supreme Court of the State of New York, dated the 26th day of January, 1931, and entered in the office of the Clerk of the County of New York on the 16th day of February, 1931, be and the same hereby are in all respects reversed as contrary to the evidence in the case and against the law, viz.: Findings of Fact numbered V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVIII, XIX, XX,
[fol. 148-70] XXII, XXIV, XXV, XXVI, XXVII, XXVIII, XXIX, XXX, XXXI, XXXII, XXXIII, XXXIV, XXXV, XXXVI, XLI, XLII, XLIV; Conclusions of Law numbered First, Second, Third, Fourth, Seventh, Eighth and Ninth, and it is

Further Ordered, Adjudged and Decreed, that the following Findings of Fact and Conclusions of Law, as made by the Appellate Division of the Supreme Court of the State of New York, First Department, in its order dated February

26th, 1932, be substituted in the place and stead of the Findings of Fact and Conclusions of Law herein reversed, viz.: Findings of Fact 1 to 43, inclusive, and Conclusions of Law I, II, III, IV, V, VI, VII, VIII and IX, and it is

Further Ordered, Adjudged and Decreed, that the defendant, Lou C. Wallick, forthwith transfer and deliver to the plaintiff 250 shares of the capital stock of the Secor Hotel Company, representing a one-quarter interest therein, and it is

Further Ordered, Adjudged and Decreed, that the defendant, Lou C. Wallick, account to the plaintiff touching the issues, benefits, profits, earnings and income, together with interest from the respective dates when such profits, income or earnings were distributed and were received by him or for his benefit and to which the plaintiff's said stock should have been or become entitled by reason of its one-quarter interest in and to the property, earnings, profits and income of such corporation since October 27th, 1908, and it is

Further Ordered, Adjudged and Decreed, that an account be taken of the sums distributed as earnings of the Secor [fol. 148-71] Hotel Company and of any successor thereof subsequent to October 27th, 1908, and of the sums that have been received by the defendant as dividends or otherwise, and particularly with respect to the moneys applicable to the plaintiff's said shares of stock, and it is

Further Ordered, Adjudged and Decreed, that after such account such other, further and final decree be made in this action as may be equitable and just, and it is

Further Ordered, Adjudged and Decreed, that the plaintiff, Edward H. Titus, recover of and from the defendant, Lou C. Wallick, his costs and disbursements as taxed, amounting to the sum of $1,527.55, and the plaintiff have execution therefor, and it is

Further Ordered, Adjudged and Decreed, that either party to this action shall have leave to apply to this Court upon notice for such other and further relief, directions and orders herein as shall be proper within the findings and decree herein made.

Judgment, March 16th, 1932.

Daniel E. Finn, Clerk.

[fol. 148-72] SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

February, 1932

Edward R. Finch, P. J. Edgar S. K. Merrell, James O'Malley, Henry L. Sherman, Alfred H. Townley, JJ.

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EDWARD H. TITUS, Appellant,

against

LOU C. WALLICK, Respondent

Appeal by plaintiff from a judgment entered upon decision at Special Term, Supreme Court, New York County, in favor of the defendant.

Thomas I. Sheridan, of counsel (Lewis F. Glaser, Aaron Frank and Philip Warren with him on the brief; Hartman, Sheridan, Tekulsky & Pecora, attorneys) for appellant.

James F. Donnelly, of counsel (Samuel Michelman with him on the brief; Olvany, Eisner & Donnelly, attorneys) for respondent.

OPINION OF APPELLATE DIVISION

Per CURIAM:

When this case was before this court on a prior appeal, we reversed as against the weight of the evidence a judgment [fol. 148-72] in favor of the defendant and directed judgment in favor of the plaintiff (Titus v. Wallick, 222 App. Div. 17). Thereafter a new trial was granted on the ground of newly discovered evidence (Titus v. Wallick, 227 App. Div. 789). The additional testimony contained in the present record is not of sufficient weight to cause us to change the determination reached on the original appeal.

For the reasons there stated the judgment should be reversed with costs, and judgment directed for the plaintiff as prayed for in the complaint, with costs.

[fol. 148-73a] EXCERPTS FROM EXHIBIT 4

SUPREME COURT, NEW YORK COUNTY

EDWARD H. TITUS, Plaintiff,

against

LOU C. WALLICK, Defendant

STATEMENT UNDER RULE 234

This action was commenced by the service of the Summons upon the defendant, Lou C. Wallick, on the 22nd day of December, 1925. He duly appeared by Lyman E. Warren, as his attorney on the 23rd day of December, 1925.

The Complaint of the plaintiff was served on the 11th day of January, 1926.

The Answer of the defendant was served on the 30th day of January, 1926.

An Amended Complaint was served by the plaintiff on the 5th day of March, 1926.

An Amended Answer to the Amended Complaint was served on the 25th day of March, 1926.

A Second Amended Answer was served on the 20th day of May, 1926.

A Second Amended Complaint was served on June 14, 1926. It was stipulated that the date of issue remain unchanged and Notices of Trial stand as served, and that the Second Amended Answer stand as the Answer to the Second Amended Complaint.

[fol. 148-74] Plaintiff appeared herein by Wallace R. Foster, his attorney. Joseph Shultz was thereafter substituted as attorney in the place and stead of Wallace R. Foster. In place of Joseph Shultz thereafter were substituted Hartman, Sheridan, Tekulsky & Pecora. The defendant originally appeared by Lyman E. Warren, his attorney. Olvaney, Eisner and Donnelly were duly substituted as attorneys for defendant in place and stead of Lyman E. Warren. Thereafter Samuel D. Jones was substituted in place and stead of Olvany, Eisner and Donnelly.

There has been no change of parties or attorneys herein except as above stated.

[fol. 148-75] At a Term of the Appellate Division of the Supreme Court, held in and for the First Judicial Department in the County of New York, on the 13 day of October, 1933.

Present: Hon. Edward R. Finch, Presiding Justice; Hon. Francis Martin, Hon. James O'Malley, Hon. Alfred H. Townley, Hon. Edward J. Glennon, Justices.

#2818

[Same title]

ORDER OF AFFIRMANCE AND NOTICE OF ENTRY

An appeal having been taken to this Court by the defendant from an order of the Supreme Court, New York County, entered on April 20, 1933, vacating and setting aside the report of Edmund M. McCarthy, Referee, filed herein on February 24, 1933, and denying the motion of the defendant to confirm the said report and for judgment in his favor, and said appeal having been submitted by Mr. Samuel D. Jones, of counsel for the appellant, and having been argued by Mr. Thomas I. Sheridan, of counsel for the respondent; and due deliberation having been had thereon,

It is hereby unanimously ordered that the said order so appealed from be modified by providing that the issues as laid down by the judgment filed herein on March 16, 1932, and the order of reference dated May 11, 1932, be referred to another referee and as so modified, the order appealed be, [fol. 148-76] and the same is hereby in all things affirmed; and is further unanimously

Ordered, that Hon. Jeremiah T. Mahoney, be and he is, appointed Referee herein, and the said Referee is hereby directed to proceed as directed by this order; and, it is further unanimously

Ordered, that the said Referee be, and he hereby is directed to proceed and take the account on the certified record taken before the former Referee or a stipulated copy thereof, and to do any and all necessary things for the purpose of concluding the reference in accordance with the terms of the judgment in this case filed on March 16, 1932, and the order of reference dated May 11, 1932; and, it is further unanimously

Ordered, that the respondent, Edward H. Titus, recover of the appellant, Lou C. Wallick, the costs of this appeal.

Enter

J. O'M.

[fol. 148-77] DECISION OF HONORABLE JEREMIAH T. MAHONEY, REFEREE

Upon full and careful consideration of all the evidence, oral and documentary, and exhibits, contained in the stipulated record taken before the former Referee, I find that the defendant should be charged with the following:

With the net earnings of the Secor Hotel Company for the years 1908 to 1931, inclusive, as set forth in the account rendered by the defendant, in the amount of	$596,588.63
With the cancellation of the amortization of the leasehold owned by the Secor Hotel [fol. 148-78] Company, formerly deducted from the net income of said corporation, in the amount of	300,000.00
With the sums withdrawn by the defendant during the years 1928 to 1931, inclusive, and charged against the net income of said Secor Hotel Company as salaries, aggregating	75,000.00
With payments made by said Secor Hotel Company to Louis Duane Wallick during the years 1923 to 1927, inclusive, and charged against the net income of said corporation, amounting to	24,166.67
With 50% of the Federal income tax assessment charged against the net income of said Secor Hotel Company in 1927, which should be borne by the Hotel Deshler owned by the defendant, in the amount of	19,034.54
With 50% of the premium on the bond given with regard to said Federal income tax assessment which was charged against the net income of said Secor Hotel Company and which should be borne by the Hotel Deshler owned by the defendant, in the amount of	933.94
With the personal expenses of the defendant for the year 1927	8,002.79
Total Charges to the Defendant	$1,023,726.57

[fol. 148-79] Said charges to the defendant to be reduced by profits alleged to have been

made by the hotel for the period 1928 to 1931, during which period no operations were carried on by the hotel in the amount of	$23,667.45
Leaving a Balance Chargeable to the Defendant, Before Computation of Interest of	$1,000,059.12
The defendant is further chargeable with interest to June 30, 1928, in the amount of	320,541.76
And with interest from July 1, 1928, to December 31, 1932, in the amount of	156,014.45
And with further interest from January 1, 1933, to December 31st, 1933, in the amount of	34,669.88
Making a Total Sum Chargeable to the Defendant of	$1,511,285.21
Plaintiff's One-quarter Interest in Said Sum Chargeable to the Defendant Amounts to ..	$377,821.30

The defendant should be compelled to account to the plaintiff for the said sum of $377,821.30, in accordance with the computations above made.

[fols. 148-80—149-150] EXCERPT FROM EXHIBIT 5

[Same title]

AFFIDAVIT OF NO OTHER OPINION

STATE OF NEW YORK,
County of New York, ss:

Samuel D. Jones, being duly sworn, says:

I am the attorney for the defendant-appellant in this action and am familiar with all the proceedings herein.

No opinion was delivered by the Court below in making the judgment appealed from herein, except as follows:

The opinion of the learned Referee in which he lucidly states the basis of every ruling he has made is a complete answer to every point made by the defendant in opposition

to the motion to confirm the report. The report is confirmed. Submit judgment.

Dated: April 13th, 1934.

E. J. McG.

Samuel D. Jones.

Sworn to before me this 14th day of November, 1934. Catherine Glynn, Notary Public. N. Y. Co. Clk's No. 440, Reg. No. 6G612. Bronx Co. Clk's No. 54, Reg. No. 198G36. Commission expires March 30, 1936.

[fol. 151] EXHIBIT 7

No. 1995

The People of the State of New York, by the Grace of God Free and Independent, to all to whom these presents shall come or may concern, Greeting:

(Seal.)

Know Ye, That we having examined the records and files in the office of the Clerk of the County of New York and Clerk of the Supreme Court of said State for said County, do find a certain Affidavit there remaining, in the words and figures following, to wit:

[fol. 152] SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

Special Term Part

Paper Submitted Sep. 7, 1934, Numbered 8

LONDON I. WALLICK, Plaintiff,

against

EDWARD H. TITUS, Defendant

STATE OF NEW YORK,
County of New York, ss:

Edward H. Titus being duly sworn, deposes and says: I am the defendant in the above entitled action and submit this affidavit in opposition to plaintiff's motion for an

injunction pendente lite restraining me from disposing of, encumbering, pledging, assigning, or in any manner dealing with the moneys received or to be received on account of a judgment entered in my favor against one Lou C. Wallick in the office of the Clerk of the County of New York, in the sum of $389,103.21.

To comprehend fully the nature of the claim asserted against me by the plaintiff in his complaint, it is deemed necessary to state herein the circumstances surrounding the action instituted by me against said Lou C. Wallick in December 1925, which resulted in a judgment in my favor in the sum of $389,103.21 made and entered in the office of the Clerk of the County of New York on May 1, 1934.

The action brought by me against Lou C. Wallick was to enforce a trust in 250 shares of stock of the Secor Hotel Company, an Ohio corporation, representing a one-fourth [fol. 153] interest therein. The relief demanded in the complaint was the return by said Lou C. Wallick to me of the certificate or certificates necessary to restore title to me, together with an accounting by said Lou C. Wallick to me of such sums of money that had been received by said Lou C. Wallick as dividends or otherwise on said 250 shares of Secor Hotel Company stock.

I met the plaintiff herein and his brother, Lou C. Wallick, for the first time in 1904. My acquaintance with Lou C. Wallick ripened into a friendship which continued for many years.

In 1908 and for some years prior thereto, I was the treasurer of Lord & Taylor, of New York City, and was also a large stockholder in said concern. The plaintiff and his brother, Lou C. Wallick, were then the owners of the Hotel Cadillac, in New York City, the furnishings for which had been supplied by Lord & Taylor.

In 1905 the plaintiff and his brother, Lou C. Wallick, were negotiating for a lease of the Secor Hotel in Toledo, Ohio. Under the arrangements made by the Wallicks with the Commonwealth Holding Corporation which was the owner of the hotel site in Toledo, the Wallicks were to furnish a surety company bond insuring that the equipment would be installed in the hotel, free of any lien. The Wallicks had applied to several bonding companies but were unable to secure a bond. The surety companies had insisted upon indemnity which the Wallicks could not furnish, and finally it was suggested that I should indemnify the bond-

ing company. The Illinois Surety Company which subsequently issued the bond was indemnified by me to the extent of $25,000., and in consideration thereof, it was agreed that [fol. 154] I should be given a one-fourth interest in the proposed hotel corporation.

On April 2, 1908 the Secor Hotel Company was incorporated under the laws of Ohio, with a capital stock of $100,000, consisting of 1,000 shares of the par value of $100 each. The lease was issued to the Wallicks and by them assigned to the Secor Hotel Company. On October 27, 1908 the Wallicks met me and gave me certificates of stock in the Secor Hotel Company aggregating 250 shares, representing one-quarter of the issued stock.

Lord & Taylor was to supply furnishings to the Secor Hotel in the amount of $125,000 and all the issued stock of the Secor Hotel Company was therefore delivered with a collateral agreement to secure the payment of this account. I retired from Lord & Taylor in 1910, and at that time the indebtedness of the Secor Hotel Company to Lord & Taylor amounted to approximately $110,000. In the meantime the relations between Lou C. Wallick and the plaintiff, his brother, had become strained and said Lou C. Wallick was fearful that the plaintiff herein would raise sufficient money to liquidate the Lord & Taylor account and over-reach said Lou C. Wallick in the control of the stock of the various hotel companies with which they were then connected.

In the early part of December, 1911, Lou C. Wallick stated to me that he was negotiating for a loan on the entire stock of the Secor Hotel Company deposited with Lord & Taylor and at the request of Lou C. Wallick I delivered the certificates which I had for 250 shares to Elmer E. Davis who had been the personal attorney for said Lou C. Wallick for a number of years and who had been closely identified with him in all his operations and who was the Secretary of the Secor Hotel Company. I received no consideration for [fol. 155] the transfer of the stock to Davis and relied entirely upon the representation by Lou C. Wallick that I could safely deliver the stock to Davis, because after certain financing was arranged said 250 shares of stock would be returned to me. Lou C. Wallick and I were then very friendly, as were also our respective families, and in consequence thereof most of my transactions with said Lou C. Wallick were not evidenced by any writings. Beginning

with 1908 a number of written agreements were entered into by the plaintiff and his brother, Lou C. Wallick, concerning their respective holdings in their various hotel enterprises. These agreements substantiated my rights to said 250 shares of Secor Hotel Company stock delivered by me to said Elmer E. Davis. In 1923 said Lou C. Wallick repudiated my ownership of said 250 shares of stock in the Secor Hotel Company.

In November 1913, Lou C. Wallick purchased the stock owned by the plaintiff herein in the Secor Hotel Company, consisting of 375 shares. It should be noted that prior to said purchase Lou C. Wallick and the plaintiff each owned 375 shares in said Secor Hotel Company and I was the owner of 250 shares. Prior to the institution of my action against Lou C. Wallick for the return of my 250 shares of Secor Hotel Company stock, the plaintiff herein professed great friendship for me. He was very bitter against his brother who had repudiated my ownership of said shares of stock, and the plaintiff stated that his brother had cheated him at the time that he purchased his interest in the Secor Hotel Company in November, 1913. The plaintiff contended that his brother had represented to him that their combined interest in said Hotel Secor aggregated only 750 shares. The plaintiff stated that Lou C. Wallick took the position in November 1913 that the remaining 250 shares were mine. [fol. 156] Since Lou C. Wallick had refused to turn said 250 shares over to me, taking the position that they were not mine, the plaintiff herein contended that he was entitled to 125 shares thereof on the ground that he and his brother, prior to November 1913, had equal interests in said Secor Hotel Company and that if my interest were eliminated, Lou C. Wallick should have compensated the plaintiff herein for 500 shares of Secor Hotel Company stock instead of 375 shares.

In view of the fact that there was no writing expressing the circumstances under which I delivered my 250 shares of stock to Lou C. Wallick, through his attorney Elmer E. Davis, I was virtually without corroborative proof to establish my ownership in said 250 shares of stock. About a year prior to the commencement of my action against Lou C. Wallick the plaintiff herein delivered to me various documents in his possession which substantiated my cause of action. He told me that his brother, Lou C. Wallick, was a

cheat and a fraud and he recited a long list of those whom he claimed said Lou C. Wallick had defrauded and overreached in the past. He assured me that he would testify and tell the truth, thus substantiating my rights to a one-fourth interest in the Secor Hotel Company. On November 23, 1925, after I had been in possession of said documents delivered to me by the plaintiff herein for about a year, the plaintiff herein importuned me, as he had done for a long time prior thereto, to agree to give him a share of my recovery, if any, against his brother. He urged that his brother had cheated him, that he, the plaintiff, was not in a good financial condition, that he had helped me, had turned over valuable documents to me and that he had in his possession facts which were indispensable to the establishment of my cause of action. I told him at that time that I had [fol. 157] already assigned any interest in the proceeds of said action against Lou C. Wallick to Walter L. Titus and Emilie F. Titus. The plaintiff stated, however, that I could not succeed in my action without him and that if I did not agree to give him a share of the recovery against his brother he would take every possible means to get back the documents that he had delivered to me. I consented to sign the instrument of November 23, 1925, but told him simultaneously therewith that I would never step into a court of law and proceed with the trial of my case against Lou C. Wallick with that paper outstanding. After my action was instituted and for six months prior to the trial of my case I continually pursued the plaintiff in my attempt to have him return said instrument of November 23, 1925 to me or to agree to its cancellation. Finally, on the morning of November 15, 1926, on the day that the trial of my case against Lou C. Wallick commenced, I met the plaintiff at the office of my attorney at 9:30 A. M. He had promised me at his home, the previous evening, that he would meet me on the day following. I told him that I would not try my case against Lou C. Wallick unless the instrument of November 23, 1925 was cancelled. He agreed to this and delivered to me an executed copy of said instrument which I destroyed immediately. Two copies were made of the November 23, 1925 instrument and each was signed by both the plaintiff and myself. Through inadvertance on my part the plaintiff took both of said copies. When he delivered one of said copies to me on November 15, 1926 I

requested that the second copy should likewise be delivered to me, but the plaintiff informed me that the copy which he had *delivered to me*, which I subsequently destroyed was the only copy of said agreement in existence.

It should be noted that it was within the realm of possi- [fol. 158] bility that I would be unable to prove in court my claim against Lou C. Wallick. It was quite within the realm of possibility that the statute of limitations would be held to be a bar against recovery by me. It was likewise within the realm of possibility that Lou C. Wallick would take the position that the 250 shares of stock which I sought to recover from him belonged to him and his brother, the plaintiff herein, and that in that event the plaintiff would thus be in a position, consistently so, to institute an action against Lou C. Wallick and compel him to make redress to the plaintiff herein. Thus, though the plaintiff admitted at all times that the stock was mine, he felt, however, that if his brother were able to defeat me, through chicanery or otherwise, in my attempt to recover said shares of stock, then in all fairness and justice Lou C. Wallick should return to the plaintiff herein one-half of my interest, to-wit: 125 shares.

The trial of my case resulted in a judgment for the defendant Lou C. Wallick. An appeal was taken to the Appellate Division and that court reversed the judgment of the Trial Court and granted judgment in my favor. After the decision of the Appellate Division the plaintiff herein professed great friendship for me. This I found difficult to understand because whatever aid he rendered to me in my suit against his brother I felt was rendered more because of his hostility to Lou C. Wallick than because of his friendship for me. The reason for plaintiff's attitude to me after the reversal by the Appellate Division was soon apparent, however, when he began dropping hints to me that he felt that I was in bad financial straits, that I had carried the burden of an expensive litigation and that he, the plaintiff, had some money available, a part of which [fol. 159] he would gladly advance to me, provided, however, that I would assign to him an interest in my judgment against his brother. The plaintiff knew, of course, that he had no claim against me by virtue of the instrument of November 23, 1925, and so when I unhesitatingly rejected his proposition he assumed different tactics. He

sent various emissaries to me suggesting that unless I would be willing to make a written agreement giving him an interest in my judgment he would again establish friendship with his brother who, he claimed, was very anxious to see him and who was making constant overtures to him. He made the subtle threat that having aided me he might perhaps find that it would be worth his while if he now aided his brother, and he stated that Lou C. Wallick had boasted that he would spend any amount of money in order to keep me from collecting my judgment. Finally in April or May, 1928, he delivered to me the ultimatum that unless I would enter into some arrangement with him whereby he was to receive a part of my judgment "the money would be kept in the Wallick family." I refused, however, to see the plaintiff and then one Frank Gentsch, an Ohio attorney, came to see me on November 10, 1928, and he told me that he was retained by and represented the plaintiff herein. He stated that the plaintiff felt that he was entitled to an interest in the judgment recovered by me and that the plaintiff insisted that I enter into a written agreement to that effect. It should be noted that these demands for a written agreement, by the plaintiff herein, were made after the instrument of November 23, 1925 was cancelled and rescinded, which instrument is now the basis for the plaintiff's complaint herein. I informed Mr. Gentsch that I was under no obligation to the plaintiff and Mr. Gentsch then stated: "London is sitting pretty. Lou is frantic to make a deal [fol. 160] with him." In other words, it was put to me bluntly that London Wallick was willing to join forces with that side which would offer him the better inducement. Both the plaintiff and his attorney, Gentsch, threatened that unless I made a written agreement giving to the plaintiff a substantial interest in the judgment recovered by me, the plaintiff would "sell out" to his brother and a charge would be made that I had committed perjury on the trial, which, it was suggested, would be followed by a motion for a new trial, with the ultimate chance, perhaps, that the decision in my favor would be reversed. I had testified at the trial of my case, truthfully so, that I had no arrangement with the plaintiff herein.

Shortly after I rejected the proposals made by the plaintiff and his attorney, Gentsch, the plaintiff herein delivered to his brother, Lou C. Wallick, the second signed copy of

the instrument of November 23, 1925, which, he falsely stated to me on November 15, 1926, was no longer in existence. As a result thereof the Grand Jury of New York County indicted me for the crime of perjury. The plaintiff testified before the Grand Jury. Thereafter, however, and upon the trial of said criminal case the charge against me was dismissed. In February 1929, Lou C. Wallick made a motion for a new trial on the ground of newly discovered evidence and on the ground that I had perpetrated a fraud upon the court. This motion was granted and an appeal from the order was sustained by the Appellate Division. This motion for a new trial was made after many hearings had been held before a Referee appointed to take the account of the sums of money due to me from Lou C. Wallick.

The second trial of my case against Lou C. Wallick resulted again in a dismissal of the complaint, but the judgment of the Trial Court was again reversed by the Appel- [fol. 161] late Division in February 1932, and the Court of Appeals affirmed the judgment in my favor in July 1932. In other words, the plaintiff's course of conduct and his hostile attitude towards me because I refused rightfully to assign to him a part of my judgment delayed the ends of justice for a period of three years.

It is significant, moreover, that after I obtained judgment against Lou C. Wallick for the second time, the plaintiff himself commenced an action against said Lou C. Wallick to recover 125 shares of the Secor Hotel Company stock, representing one-half of the shares belonging to me, which ownership was disputed by Lou C. Wallick. When the plaintiff's action against said Lou C. Wallick reached trial it was settled by him for the sum of $2,500. as I am informed and verily believe. The entire proceeds of this settlement was retained by the plaintiff herein. The plaintiff has never laid claim to any interest in the judgment recovered by me against Lou C. Wallick by virtue of the paper signed by me on November 23, 1925. His demands upon me were made in disregard of said paper, the plaintiff knowing full well that said paper was cancelled and rescinded, but if the plaintiff is correct in his contention that he has acquired certain rights against me by virtue of the paper of November 23, 1925, then there would be no justification for his failure to tender to me one-half of the proceeds of

his suit against Lou C. Wallick. His failure to make such tender is perfectly consistent with the position assumed by me at all times that the plaintiff herein acquired no rights under the paper of November 23, 1925. It is perfectly consistent with the plaintiff's demands since 1928 and with the demands of his attorney, Gentsch, that I should enter into an agreement with the plaintiff to give him an in-
[fol. 162] terest in the judgment against Lou C. Wallick. His retention of said sum of $2,500 is likewise consi-tent with my statement that the plaintiff herein knew in November 1925 and prior to the execution of the instrument of November 23, 1925 that I had assigned my interest in the case against Lou C. Wallick to Walter L. Titus and Emilie F. Titus.

It should be noted, moreover, that there is a peculiar chain of circumstances which seems to indicate a united effort upon the part of the borthers Wallick to "keep the money in the Wallick family," as the plaintiff herein threatened to do in April or May, 1928, unless I made some arrangement with him. On May 1, 1934, judgment was entered in my favor against Lou C. Wallick in the amount of $389,103.21 after the report of the Referee in said case was confirmed. A notice of appeal dated May 9, 1934 was served by the attorneys for said Lou C. Wallick on May 31, 1934. Within a week after said notice of appeal was prepared and on May 16, 1934 the plaintiff herein verified his complaint in the within action. The preparation and verification of this complaint by the plaintiff herein within a week after the preparation of Lou C. Wallick's notice of appeal and within two weeks after the entry of judgment against said Lou C. Wallick may be mere coincidence. It may, however, be more than mere coincidence. It may be substantiation of my belief that the brothers Wallick are now more than simply brothers in name and that they are intent upon seeing to it that "the money is kept in the Wallick family."

The plaintiff's application for an injunction pendente lite should be denied. Prior to my execution of the instrument of November 23, 1925, I assigned my interest in my claim against Lou C. Wallick to Walter L. Titus, my
[fol. 163] brother, and Emilie F. Titus, my wife. The plaintiff herein knew of this assignment before the instrument

of November 23, 1925 was executed. It is respectfully submitted that it does not lie within the jurisdiction of this court to now enjoin what has already been accomplished. Furthermore, no injunction should be granted pendente lite unless the complaint reflects some likelihood of success on the part of the plaintiff. In this case it is quite apparent that the paper dated November 23, 1925 and marked Exhibit "A", relied upon by the plaintiff as the basis for a cause of action on contract, fails to spell out the requisites of a valid and enforceable contract. It is submitted, moreover, that proper procedure by the plaintiff calls for institution of proceedings under Article 10 of the Debtor and Creditor Law and that injunctive relief does not lie herein.

Wherefore I respectfully request that plaintiff's motion should be denied with costs.

Edward H. Titus.

Sworn to before me this 17th day of Aug. 1934.
Henry G. Bralower.

[fol. 164] All of which we have caused these presents to be exemplified, and the Seal of our said Supreme Court to be hereunto affixed.

Witness, Hon. Aaron J. Levy a Justice of the Supreme Court for the County of New York, the 17th day of Oct. in the year of our Lord one thousand nine hundred and 35 of our independence the one hundred and 60.

Albert Marinelli, Clerk. (Seal.)

I Aaron J. Levy a Presiding Justice at a Special Term of the Supreme Court of the State of New York for the County of New York, do hereby certify that Albert Marinelli whose name is subscribed to the preceding exemplification, is the Clerk of the said County of New York, and Clerk of said Supreme Court for said County duly elected and sworn, and that full faith and credit are due to his official acts. I further certify that the Seal affixed to the exemplification is the seal of our said Supreme Court, and that the attestation thereof is in due form.

Dated, New York, Octo 17th 1935.

(Signed) Aaron J. Levy, Justice of the Supreme Court of the State of New York.

State of New York,
County of New York, ss:

I, Albert Marinelli Clerk of the Supreme Court of said State in and for the County of New York, do hereby certify that Hon. Aaron J. Levy whose name is subscribed to the proceding certificate, is Presiding Justice at a Special Term of the Supreme Court of said State in and for the County of New York, duly elected and sworn, and that the signature of said Justice to said certificate is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court this 17th day of October 1935.

Albert Marinelli, Clerk. (Seal.)

[fol. 165] Exhibit 8

Know All Men by These Presents, that I, Edward H. Titus, of Closter, New Jersey, in consideration of One ($1.00) Dollar, lawful money of the United States, and of other good and valuable considerations, the receipt whereof is hereby acknowledged, have sold, assigned, transferred and set over, and by these presents do sell, assign, transfer and set over unto Walter L. Titus, of the Borough of Manhattan, City, County and State of New York, his executors, administrators and assigns, to his and their own proper use and benefit, any and all claims which I now have against Louis C. Wallick, of Closter, New Jersey.

And I do hereby give the said Walter L. Titus, his executors, administrators and assigns, full power and authority, for his or their own use and benefit, but at his or their own cost, to ask, demand, collect, receive, compound and give acquittance for the same, or any part thereof, and in my name or otherwise to prosecute and withdraw any suits or proceedings at law or in equity therefor.

In Witness Whereof, I have hereunto set my hand and seal, this 31st day of March, 1924.

(Signed) Edward H. Titus. (L. S.)

In presence of (Signed) Emma K. L. Swenson.

State of New York,
County of New York, ss:

On the 31st day of March, 1924, before me personally came Edward H. Titus, to me known and known to me to be

the individual described in and who executed the foregoing assignment and he acknowledged to me that he executed the same.

(Signed) Emma R. L. Swenson, Notary Public. Bronx County No. 127, Reg. No. 66. Certificate Filed New York Co. No. 649 Reg. No. 5579. Certificate Filed Kings Co. No. 62, Reg. No. 5318. My Commission Expires March 20, 1925.

[fol. 166] IN COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

No. 143,633

EDWARD H. TITUS, Plaintiff,

v.

LOU C. WALLICK, Defendant

DECISION—Rendered on the 21st Day of April, 1936

LEACH, J.:

This action is for the recovery of a judgment in this state based upon a judgment obtained by the plaintiff against the defendant by the consideration of the Supreme Court in and for the County of New York on the 1st day of May, 1934.

A jury was waived and trial had to the Court.

The amended answer sets up defenses:

1. That the judgment in the New York proceeding is not responsive to the issues tendered by the pleadings.

2. The plaintiff in the action at bar, here in Franklin County, Ohio, is not the real party in interest.

3. The judgment in the New York proceedings was procured through fraud practiced upon the New York Court and upon the defendant, in that plaintiff was at no time, from the very institution of the suit, the real party in interest and surreptitiously suppressed that fact.

4. A general denial.

The first defense raises an interesting question. On consideration of the evidence and the law the Court is inclined

to the opinion that this question not only could have been but was presented to the New York Courts in the proceed-
[fol. 167] ings in which the judgment was obtained, and may not be re-litigated here. American Surety Co. v. Baldwin, 287 U. S., 156. Harrington v. Denny, 3 Fed. Supp., 584.

Moreover, in the case of Reynolds v. Stockton, 140 U. S., 254, the leading case relied upon by the defendant, Justice Brewer seemed to recognize an exception to the rule contended for by defendant, that exception being—where regardless of the pleadings, the defendant "takes actual part in the litigation of the matters determined." The complete sentence on the subject being:

"Whatever may be the rule where substantial amendments to the complaint are permitted and made, and the defendant responds thereto, *or where it appears that he takes actual part in the litigation of the matters determined the rule* is universal that, where he appears and *responds only to the complaint as filed*, and no amendment is made thereto the judgment is conclusive only so far as it determines matters which by the pleadings are put in issue." (Italics ours.)

I think the record of the case in New York shows that the defendant appeared and took actual part in the litigation of the matters determined.

Defenses 2 and 3 may be considered together. The New York judgment against the defendant was obtained on May 1, 1934. Thereafter London I. Wallick, a brother of defendant, in an attempt to obtain from the plaintiff a part of the proceeds of plaintiff's judgment in New York, instituted an action in the Supreme Court of the State of New York, County of New York, and filed a motion "for an injunction pendente lite restraining me (Edward H. Titus, defendant in that case and plaintiff here) from disposing of, encumbering, pledging, assigning, or in any manner dealing with the moneys received or to be received on account of a judgment entered in my (Edward H. Titus') favor against one Lou C. Wallick in the office of the clerk of the County of New York, in the sum of $389,103.21.

[fol. 168] On the 17th day of August, 1934, the plaintiff under oath made an affidavit which was filed in the Court in opposition to London I. Wallick's motion for the injunction. In that sworn statement plaintiff stated among other things:

"I told him (London I. Wallick) at that time (Nov. 23, 1925, when agreement between London I. Wallick and Edward H. Titus for 50—50 split of proceeds of the New York litigation against Lou C. Wallick was executed, Record on appeal. Defts." Exhibit No. 3, page 626) that I had already assigned *any* interest in the proceeds of said action against Lou C. Wallick to Walter L. Titus and Emilie F. Titus." (Parenthetical insertion by the writer.)

He further stated in the said affidavit:

"The plaintiff's application for an injunction pendente lite should be denied. Prior to my execution of the instrument of November 23, 1925, I *assigned my interest in my claim* against Lou C. Wallick to Walter L. Titus my brother, and Emilie F. Titus, my wife. * * * *It is respectfully submitted that it does not lie within the jurisdiction of this Court to now enjoin what has already been accomplished.*"

What was it that had already been accomplished? The motion of London I. Wallick was to enjoin Edward H. Titus "from disposing of, encumbering, pledging, assigning or in any manner dealing with the moneys received or to be received," etc.

The plain purport of the above affidavit, if it has any meaning at all, was to lead the Court, in London I. Wallick's case, to believe that the assignment and disposal of his whole interest in the claim was a fact accomplished; being already done it could not be enjoined.

What is the effect of this affidavit on the pending case? It would seem entirely clear either that it was intended to mislead and deceive the Court in which it was filed, or being true that Titus has no interest in the claim sued upon this Court, [fol. 169] and in fact had no interest when he obtained the judgment in the New York Court.

In other words, it seems clear that Titus is attempting to take two contradictory and conflicting positions in two different Courts to his advantage in each.

"The affidavits and depositions of a party are of course, competent to show admissions made by him therein, although used in another suit, and from their solemn character are entitled to great weight." Jones on Evidence, Second Edition, Vol. 3, page 1851.

The Court can see no difference as to the rule of admissibility of admissions in affidavits filed in a legal proceeding from that governing admissions contained in pleadings therein, as to which: It is generally conceded that judicial admissions are receivable against the pleader in proceedings other than those in which they were filed on behalf of the pleader's opponent. It is a further rule of general application that a pleading containing an admission is admissible against the pleader in a subsequent proceeding, on behalf of a stranger to the former action. Such is the position of the Supreme Court of Ohio." 17 O. Jur. page 308; Broadrup v. Woodman, 27 O. S., 553; see annotation in 14 A. L. R., 22.

Whether such admissions, solemnly made under oath, and filed in Court for the purpose of having the Court act in reliance thereon are conclusive on the person making the statement or whether the truth of such statements may be rebutted or explained in the later action is a question upon which there is a conflict of authority, and may depend upon the peculiar facts of the case. Jones, in his work on Evidence, 2nd Edition, at page 1852 as a continuation of the quotation, supra, says:

[fol. 170] "and from their solemn character are entitled to great weight; but they are not conclusive against him and do not constitute an estoppel."

Four English cases, only, are cited by Jones in support of this statement.

The annotater in 14 A. L. R. at page 75 says:

"The limits within which an admission in a pleading may be deemed conclusive under the rules of pleading are very narrow. A pleading is sometimes held binding on the pleader where the parties or the *subject-matter*, or both, are the same, under the rules of estoppel." Citing Stephenson v. Walker, 8 Boxt (Tenn.) 289; Watterson v. Lyons, 9 Lea (Tenn.) 566.

In Bender v. Belknap, 23 La. Ann. 764, the Court said:

"It is a well settled rule in the administration of justice that a party will not be permitted to deny what he has solemnly acknowledged in a judicial proceeding. The defendant will not be heard to contradict his sworn statement that

he received the property in controversy as owner. The only means of courts to protect the integrity of judicial proceedings are the sanctity which the law throws around them, and, if all the restraints of justice and truth are lost sight of by litigants 'the law itself meets the emergency by holding the parties to thier allegations of record, and not permitting them to falsify what they have solemnly declared to be the truth.' " Denton v. Erwin, 5 La. Ann., 18; Gridley v. Connor, 4 La. Ann. 416; Freeman v. Savage, 2 La. Ann. 269.

There are a number of other Louisiana cases supporting this doctrine and there are also a number of cases from the same state to the contrary or in other words, authority for the proposition that while allegations made in pleadings of another suit are always receivable in evidence, they are not conclusive, or operate as estoppel unless the party who [fol. 171] invokes them has been prejudiced in some way by them. For list of Louisiana cases pro and con see opinion in Farley v. Frost-Johnson Lumber Co., 133 La., 498; (63 Southern, 122).

Coming now to Ohio cases on the subject we find:

Railroad Co. v. Cleveland, 15 O. C. C. (N. S.) at pages 206-207, in which the Railroad Company in a prior action brought by other parties had "by its answer, expressly repudiated the claim of title on which it now seeks to found its prescriptive right, and it and the other defendant companies planted themselves squarely and solely upon their rights as derived from the contract of 1849." • • •

"This defense prevailed and the contract was upheld. The City *was not a party to the action*, and therefore is not bound by the judgment, but that fact affords no reason for refusing to give effect to the Cleveland & Pittsburgh Railroad Company's admission that it was not then holding adversely to the city, as it now claims to have done. *Not only is its answer in the Holmes case admissible in evidence now, but it is conclusive as against its alleged title by prescription, not indeed by any tolling of the statute, but by characterizing the defendant's possession as permissive and consistent with the original public use.*"

In an early opinion, by the Ohio Supreme Court, in Douglass v. Scott, 5 Ohio, at page 198, we find the following:

"The admission of a fact, however made, is always evidence of the fact against the party making the admission, but the effect of the admission depends upon the manner and purpose for which it is made. It may be presumptive evidence only of the truth, and liable to be denied or disproved. *But if made for the purpose of influencing the conduct, or deriving a benefit to (from) another, so that* [fol. 172] *it can not be denied without a breach of good faith, the law enforces the rule of good words as a rule of policy, and precludes the party from repudiating his representations and denying the truth of his admissions;* and an admission of record, or made for the purpose of superseding proof, or deliberately made under the seal of the party, is of such binding efficacy that under no circumstances is the party permitted to disprove it."

We do not find that the rule so stated has been modified by our Supreme Court. But whether the rule be that such admission in another judicial proceeding be conclusive against him in another action, or subject to be explained, it does not appear to have been explained in this case. The plaintiff did not personally appear and testify in this case; his deposition, however, was taken and filed herein, and is before the Court. In the deposition no reference is made, no question asked or answered as to the affidavit filed in the London Wallick case. Questions were asked and answered relative to the execution of a complete assignment by Edward H. Titus of the claim in question to Walter L. Titus dated March 31, 1924, said document being attached to the deposition and there marked as Ex. No. 8; and as to the execution in duplicate of an instrument, signed by Walter L. Titus and Edward H. Titus, on December 1st, 1925, the original and the duplicate being attached to the deposition, marked as Exhibits E and D, respectively.

By the writing of December 1st, 1925, Walter L. Titus, "does hereby sell, assign, and set over" unto Edward H. Titus, "all his right, title and interest in and to said claim against Lou C. Wallick and all his right, title and interest in and to said two hundred and fifty (250) shares of the capital stock of the said Secor Hotel Company above described."

In the next paragraph Walter Titus appoints Edward H. Titus "to be his true and lawful attorney, irrevocably, for

him, and in his name, and stead, but for" Edward H. Titus' "own benefit to sell, assign, transfer, set over, pledge, com- [fol. 173] promise, or discharge the whole, or any part of said claim, and to do all acts and things necessary or proper, for any such purpose, and to ask, collect, receive and sue for said stock, or for any moneys which may grow due, upon said claim, and to substitute one person, or more, with like powers; hereby ratifying and confirming all that the party of the second part, (Edward H. Titus) or his substitute, or substitutes, shall lawfully do, by virtue hereof."

It is next provided, in the following paragraph, what shall be done with the proceeds of the collection when received by Edward H. Titus: The party of the second part agrees that he will receive, as the property of the party of the first part (Walter L. Titus), any stock certificates, checks, drafts or money applicable to said claim, which shall at any time come into the possession or control of the party of the second part, and will immediately endorse, transfer and deliver same to the party of the first part, to have and to hold the same and every part thereof, for the following uses and purposes to-wit: then follows an enumeration of the uses and purposes:

(a) In effect to pay costs and expenses.

(b) To repay one-half of the balance to Emilie F. Titus.

(c) To reimburse Walter F. Titus for one-half of any and all moneys paid or to be paid by him in paying and discharging the debts and liabilities incurred by James L. Titus under firm name of Titus Brothers to the extent that such one-half exceeds one-half of the moneys heretofore or hereafter paid out and disbursed by the party of the second part in paying off and discharging the debts and liabilities incurred by said James L. Titus under the name and style of Titus Brothers, etc.

(d) If the remainder of the proceeds are sufficient, to pay a note of $11,361.25 given by Edward H. Titus to Margaret Titus.

(e) To pay off any indebtedness now due (amount not stated) or to become due, from Edward H. to Walter L. Titus.

[fol. 174] (f) To repay Edward H. Titus, the surplus remaining after payment of the foregoing.

There was no testimony in the deposition by Edward H. Titus, or by any one else, either in the deposition or elsewhere that the two agreements, Exhibit 8 and Exhibits D and E, are or were the only agreements outstanding between the parties.

The first of these writings (Ex. 8) was straight assignment of the entire claim to Walter L. Titus. Immediately after its execution and delivery the entire title to the claim was in Walter L. Titus. In it was no assignment to Emilie F. Titus, the wife of Edward H. Titus. By the second writing, however, it may be classified, it can not be said that Emilie F. Titus was the assignee. Whether Edward H. Titus should be classified as an assignee, or as an attorney in fact, or partly the one and partly the other, and whether, if this instrument stood alone, he would have had such an interest, equitable or otherwise, as would constitute him the real party in interest in the sense required under the statutes of New York or of Ohio or both, it is unnecessary to inquire, for subsequent to the date of this latter instrument, to-wit, on August 17th, 1934, he filed the affidavit in the London Wallick case hereinbefore referred to which in substance stated that it was beyond the power of the Court to enjoin him from disposing of, encumbering, pledging, assigning or in any manner dealing with the moneys received on account of a judgment in his favor against Lou C. Wallick. The thing had been done, he says, before the injunction was sought, and he himself, states this to be the fact.

It is true he states that prior to November 23, 1925, he had assigned his interest in the claim to Walter L. Titus, his brother, and Emilie F. Titus, his wife. The instrument [fol. 175] of assignment of the whole claim to Walter L. Titus was dated March 31, 1924; this is, of course, before November 23, 1925. (Ex. No. 8, attached to the deposition.) His wife is not mentioned in this assignment. Nor is any assignment presented in the deposition, or otherwise, showing any transfer of the claim in part, to Emilie F. Titus, prior to November 23, 1925.

But if, as he says in the affidavit, the plaintiff had, prior to November 23, 1925, assigned his claim to Walter F. Titus and to Emilie F. Titus, Emilie F. Titus, at least, does not join in reassigning the claim back to him, in the instrument of December 1st, 1925, if that instrument may be considered as a reassignment, rather than a power of attorney. He

asserts, therefore, in the affidavit, an asignment to his wife, made prior to November 23, 1925 which is not exhibited in this case, but which he says was outstanding on the date of his affidavit.

If claim be made that his affidavit states that the assignment mentioned therein to his brother and sister was prior to November 23, 1925, but that, his suit against Lou C. Wallick in New York and in this Court is based on his having a suable interest by virtue of the instrument of Dec. 1, 1925, then what shall be said of the statement in the affidavit, speaking as of the date thereof August 17, 1934, that it is "respectfully submitted that it does not lie within the jurisdiction of this Court to now enjoin what was already been accomplished? Were there, then, other agreements? From the analysis of the affidavit it must be so assumed. The deposition does not say. But the affidavit says by way of deliberate and inescapable implication that prior to November 23, 1925, he had assigned his claim to his brother and to his wife, and that on the date of the affidavit, such assignments were in effect.

This Court can find no explanation of the affidavit filed in [fols. 176-179] the London Wallick case; it must, therefore be taken as true. If true, the judgment upon which this action is based, was obtained by fraudulently concealing from the Court in which the judgment was obtained, the facts contained in the affidavit, and such judgment would be impeachable there for such fraud.

"If it is impeachable there for fraud, it is to the same extent impeachable elsewhere." Freeman on Judgments, 5th Ed. Vol. 3, Sec. 1401. Lieber v. Lieber, 143 S. W., 459; Snyder v. Critchfield, 44 Neb. 66, 62 N. W. 306; Levin v. Gladstein, 142 N. C., 482, 32 L. R. A. (N. S.), 905; (See annotation in the L. R. A. Report where cases are collected.)

The finding and judgment herein will be for the defendant.

(Signed) Chas. A. Leach.

Vorys, Sater, Seymour & Pease (Byron Ford), Attorneys for Plaintiff. Thomas I. Sheridan, Lewis F. Glaser, Aaron Frank, of Counsel for Plaintiff. Butler & Summer, Attorneys for Defendant.

[fol. 180] In Court of Common Pleas of Franklin County

Judgment—December 3, 1936

Wherefore, it is hereby ordered, adjudged and decreed that plaintiff's exhibit D and defendant's exhibits numbered 1, 2, 3, 4, 5, 6, 7, 8 and 9 be and the same are admitted in evidence in this cause and that the motions made by the plaintiff at the close of all of the evidence be and the same are hereby overruled and that the motion of the plaintiff for an order setting aside the decision rendered by the court herein and granting a new trial, and for a judgment in plaintiff's favor notwithstanding the decision of the court, be and the same is hereby overruled and it is therefore considered that said defendant go hence without day and recover of said plaintiff, his costs herein. Judgment is rendered against the plaintiff for his costs herein.

To all of the above findings, rulings and orders (excepting as to the finding and ruling on plaintiff's exhibit D) the plaintiff excepts. As to the finding and ruling on plaintiff's exhibit D the defendant excepts.

To all of which rulings, orders, judgments and decrees of the Court in overruling the motions hereinbefore referred [fol. 181] to and in entering up judgment on the findings of said Court the plaintiff at the time excepts and still excepts; and on the 18th day of December 1936, filed his Bill of Exceptions in said cause.

And thereupon, the Clerk of said Court having forthwith notified the defendant of the filing of said Bill of Exceptions, and no objection or amendment to said Bill of Exceptions having been filed by said defendant, said Clerk on the 28th day of December, A. D. 1936, transmitted the same to Hon. Charles A. Leach, Trial Judge as aforesaid, for allowance and signature.

And thereupon, said Court on the 28th day of December 1936, received said Bill of Exceptions, and said Court did on the 20th day of January 1937, certify that the foregoing is all of the evidence offered, introduced and admitted on behalf of the plaintiff and on behalf of the defendant on the trial of the aforesaid cause, and did transmit the same to the office of the Clerk of said Court, to be made a part of the record herein, but not spread at large upon the Journal, according to the statute in such case made and provided,

all of which is accordingly done as of said September Term, A. D. 1936, of said Court.

(Signed) Charles A. Leach, Judge Common Pleas Court.

[fol. 182] In Common Pleas Court of Franklin County, Ohio

[Title omitted]

Request to Separately State Conclusions of Fact From Conclusions of Law—Filed April 24, 1936

Now comes plaintiff, Edward H. Titus, and with a view to excepting to the court's decision on questions of law involved in the trial, requests that the court shall state in writing the conclusions of fact found separately from the conclusions of law.

(Signed) Vorys, Sater, S., P., Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 183] In Court of Common Pleas, Franklin County, Ohio

[Title omitted]

Motion for New Trial—Filed April 24, 1936

Plaintiff moves the court for an order setting aside the decision heretofore rendered in this case and granting a new trial, for the following reasons, to-wit:

1. The decision of the court is against the weight of the evidence and contrary thereto.

2. The decision of the court is contrary to law.

3. The court erred in the admission of evidence over the objection and exception of plaintiff.

4. The court erred in excluding evidence offered by plaintiff to which objection was made and exceptions were taken.

5. The court erred in overruling plaintiff's motion for judgment at the close of defendant's case.

6. The court erred in overruling plaintiff's motion for judgment at the close of all of the evidence.

7. Other errors of law occurring at the trial of said cause prejudicial to the rights of plaintiff and by which plaintiff was prevented from having a fair trial.

8. The decision is not sustained by sufficient evidence and is contrary thereto.

Plaintiff moves the court for a judgment in his favor notwithstanding the decision of the court.

(Signed) Vorys, Sater, S. & P., Attorneys for Plaintiff.

(Copy of this Motion mailed to defendant's attorney this 24th day of April, 1936.)

[File endorsement omitted.]

[fol. 184] In Common Pleas Court of Franklin County, Ohio

[Title omitted]

Motion for Ruling as to Certain Exhibits—Filed April 24, 1936

Plaintiff by his attorneys moves that the court shall rule upon th. admissibility of plaintiff's Exhibit "D" and defendant's exhibits numbered 1, 2, 3, 4, 5, 6, 7, 8 and 9. Plaintiff further moves that the court shall rule upon the motions made by plaintiff at the close of defendant's evidence and at the close of all of the evidence.

(Signed) Vorys, Sater, Seymour & Pease, Attorneys for Plaintiff.

Copy of this motion mailed to Butler & Summers, attorneys for the defendant, this — day of April, 1936.

[File endorsement omitted.]

[fol. 185] In Court of Common Pleas, Franklin County, Ohio

[Title omitted]

Order Overruling Motion for New Trial—Filed June 30, 1936

Adhering to the conclusions reached in the Court's opinion in deciding this cause, and for the reasons therein set forth, and without desiring to add anything to that opinion, the motion for a new trial will be overruled.

June 30, 1936.

Leach, Judge.

[File endorsement omitted.]

[fol. 186] In Court of Common Pleas, Franklin County, Ohio

[Title omitted]

Opinion—Filed September 19, 1936

(1) Decision on Admissibility in Evidence of Plaintiff's Exhibit "D" and Defendant's Exhibits No. 1, 2, 3, 4, 5, 6, 7, 8 and 9.

(2) Decisions Overruling the Motions Made by Plaintiff at the Close of Defendant's Evidence and at the Close of All the Evidence.

(3) Statement in Writing of the Facts Found Separately from the Conclusions of Law.

Leach, J.:

This court having, on April 21, 1936, filed its written decision and opinion, wherein was contained its finding and decision that judgment should be entered for defendant on the issues joined in said cause, which cause was submitted to the court, without a jury, on the pleadings and evidence, arguments and briefs of counsel;

Thereafter, on April 24, 1936, the defendant filed his motion for a new trial; on June 30, 1936, the court placed on

file its written decision overruling said motion for a new trial;

On April 24, 1936, the defendant also filed a motion in words and figures as follows:

"Plaintiff by his attorneys moves that the court shall rule upon the admissibility of Plaintiff's Exhibit 'D' and Defendant's Exhibit numbered 1, 2, 3, 4, 5, 6, 7, 8 and 9. Plaintiff further moves that the court shall rule upon the motions made by plaintiff at the close of defendant's evidence and at the close of all the evidence."

[fol. 187] In compliance with the request contained in said motion, this court hereby rules that each and all of the exhibits referred to in the foregoing referred to motion are, under the rules of evidence, and in view of the issues made by the pleadings, admissible in evidence; and the court hereby announces its ruling and decision that the motions made by plaintiff at the close of all the evidence should be and the same are overruled, there being no motions made at the close of defendant's evidence.

On the same date on which defendant's motion for new trial was filed, to-wit, April 24, 1936, defendant filed a request that the court shall state in writing the conclusions of fact found separately from the conclusions of law. The court in compliance with said request hereby makes its:

Statement in Writing of the Facts Found Separately from the Conclusions of Law

A. Findings of Facts

1. That by consideration of the Supreme Court in and for the County of New York in the Borough of Manhattan, City of New York, on the 1st day of May, 1934, the plaintiff recovered a judgment against the defendant in the sum of three hundred seventy-seven thousand, eight hundred twenty-one 30/100 ($377,821.30) dollars, with interest from January 1, 1934, on the sum of two hundred fifty thousand, fourteen and 78/100 ($250,014.78) dollars, amounting to the sum of six thousand three hundred thirty-three and 71/100 ($6333.71) dollars, together with the cost duly taxed in the sum of four thousand nine hundred forty-eight and 20/100 ($4948.20) dollars, making in all the sum of three hundred

eighty-nine thousand one hundred three and 21/100 ($389,103.21) dollars.

2. That said Supreme Court in and for the county of New York in the Borough of Manhattan, City of New York, was [fol. 188] and is a court of general jurisdiction, duly created by the laws of the State of New York.

3. That no part of said judgment has been paid.

4. That the petition in this action in the Court of Common Pleas of Franklin County, Ohio, was filed on August 20, 1934.

5. The defendant, Lou C. Wallick, appeared and took an actual part in the litigation which resulted in the judgment against him in the Supreme Court in and for the County of New York, in the Borough of Manhattan, City of New York, being the same judgment pleaded in the petition in this case.

6. That subsequent to May 1st, 1934, and prior to August 20th, 1934, (the date on which the petition and pending cause in the Court of Common Pleas in Franklin County was filed) London I. Wallick, a brother of the defendant in this case, instituted an action in the Supreme Court of the State of New York, County of New York, in an attempt to obtain from the plaintiff Edward H. Titus, a part of the proceeds of plaintiff's judgment in the Courts of New York and filed a motion "for an injunction pendente lite restraining me (Edward H. Titus, the defendant in that case and plaintiff here) from disposing of, encumbering, pledging, assigning or in any manner dealing with the monies received or to be received on account of a judgment entered in my (Edward H. Titus) favor against one Lou C. Wallick, in the office of the Clerk of the County of New York in the sum of $389,103.21."

7. On the 17th day of August, 1934, the plaintiff herein, Edward H. Titus, under oath, made and filed an affidavit in the said court in opposition to London I. Wallick's motion for the injunction. In said affidavit, so filed with the court, the plaintiff stated among other things, "I told him (London [fol. 189] I. Wallick) at that time (November 23rd, 1925, when agreement between London I. Wallick and Edward H. Titus for fifty-fifty split of proceeds of the New York litigation against Lou C. Wallick, was executed, record on appeal. Defendant's Exhibit No. 3, page 626); that I had

already assigned any interest in the proceeds of said action against Lou C. Wallick to Walter L. Titus and Emilie F. Titus" (parenthetical insertion by the writer).

Edward H. Titus, plaintiff rerein, further stated in said affidavit: "The plaintiff's application for an injunction pendente lite should be denied. Prior to my execution of the instrument of November 23rd, 1925, I assigned my interest in my claim against Lou C. Wallick to Walter L. Titus, my brother, and Emilie F. Titus, my wife * * *. It is respectfully submitted that it does not lie within the jurisdiction of this court to now enjoin what has already been accomplished."

8. That the facts as stated by the foregoing quoted excerpts from the said affidavit were and are true.

9. That at the institution of the suit in which the plaintiff recovered said judgment, and at all times during the litigation of said suit, the plaintiff was not the real party in interest and did not own or have any interest in the alleged claim against the defendant therein sued upon and plaintiff in and during said litigation suppressed and concealed that fact from the court and from the defendant.

10. Relative to the defense that the judgment in the New York proceedings is not responsive to the issues tendered by the pleadings, the court finds as a matter of fact from the evidence that such question was presented to the New York courts by the defendant in the proceedings in which the judgment was obtained.

B. Conclusions of Law

[fol. 190] 1. Relative to the defense that the judgment in the New York proceedings is not responsive to the issues tendered by the pleadings, the court finds as a matter of law that since said question not only could have been but was presented to the New York courts in the proceedings in which the judgment was obtained, that the same may not be re-litigated here.

2. That the affidavit of Edward H. Titus filed in the Supreme Court of the State of New York, County of New York, (Finding of Fact No. 6) is properly admissible.

3. The court finds as a conclusion of law that the plaintiff herein is not the real party in interest in this action and has no right to maintain this action in his name.

4. That the plaintiff's judgment procured in the courts of New York was procured through fraud practiced upon the New York courts and upon the defendant, in that at the institution of the suit in which the plaintiff recovered said judgment, and at all times during the litigation of said suit, the plaintiff was not the real party in interest and did not own or have any interest in the alleged claims against the defendant therein sued upon and had no right to prosecute said suit on the same in his name.

5. That during said litigation in the courts of New York, the plaintiff suppressed and concealed the fact that a person or persons other than himself owned the claims upon which suit was brought in his name and were the real parties in interest in whose name or names alone suits could be rightfully prosecuted.

6. That the said judgment so obtained in the State of New York was and is impeachable there for fraud and it was and is to the same extend impeachable in the courts of Ohio.

7. That the finding and judgment herein will be for the defendant.

Dated at Columbus, Ohio, this 19th day of September, 1936.

(Signed) Charles A. Leach, Judge of Court of Common Pleas, Franklin County, Ohio.

[File endorsement omitted.]

[fol. 191] In Common Pleas Court, Franklin County, Ohio

[Title omitted]

Motion for Amendment of Finding—Filed October 24, 1936

Plaintiff by his attorneys respectfully requests and moves the court to amend its finding of fact by finding—

1. Whether a reassignment of the claim was made by Walter L. Titus to Edward H. Titus on December 1, 1925.

2. Whether the defendant had knowledge of a reassignment from Gentch's affidavit submitted on the motion for

a new trial and from the cross-examination of Titus at the second trial.

(Signed) Vorys, Sater, Seymour & Pease, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 192] In Common Pleas Court, Franklin County, Ohio

[Title omitted]

Order—Filed December 3, 1936

This cause came on for hearing on the motion of the plaintiff requesting and moving the court to amend its finding of fact and was submitted to the court, upon consideration whereof the court finds that said motion is not well taken and should be overruled.

Wherefore, it is hereby ordered, adjudged and decreed that said motion of the plaintiff be and the same is hereby overruled, to which the plaintiff excepts.

(Signed) Charles A. Leach, Judge.

Approved by Vorys, Sater, S., P., Attorneys for Plaintiff. Butler and Summer, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 193] In Court of Common Pleas, Franklin County, Ohio

[Title omitted]

Order on Motions—Filed December 3, 1936

The parties by their attorneys come, by agreement waive a jury with the consent of the court and submit this cause to the court on the pleadings and evidence, and arguments and briefs of counsel, on consideration whereof the court finds on the issues joined, for the defendant.

Whereupon, the plaintiff files: his motion for an order setting aside the decision rendered by the court and grant-

ing a new trial and for a judgment in his favor notwithstanding the decision of the court; and his motion that the court rule upon the admissability of plaintiff's exhibit "D" and defendant's exhibits numbered 1, 2, 3, 4, 5, 6, 7, 8 and 9 and that the court rule upon the motions made by plaintiff at the close of defendant's evidence and at the close of all of the evidence. And said motions are submitted to the court on consideration whereof the court finds that the motion for an order setting aside the decision rendered by the court and granting a new trial and for a judgment in plaintiff's favor notwithstanding the decision of the court is not well taken and should be overruled. The court further finds that each and all of said exhibits are admissable in evidence in this cause and further finds that the motions made by the plaintiff at the close of all the evidence should be overruled and that there were no motions made by the plaintiff at the close of the defendant's evidence.

[fols. 194-197] Wherefore, it is hereby ordered, adjudged and decreed that plaintiff's exhibit "D" and defendant's exhibits numbered 1, 2, 3, 4, 5, 6, 7, 8 and 9 be and the same are admitted in evidence in this cause and that the motions made by the plaintiff at the close of all of the evidence be and the same are hereby overruled and that the motion of the plaintiff for an order setting aside the decision rendered by the court herein and granting a new trial, and for a judgment in plaintiff's favor notwithstanding the decision of the court, be and the same is hereby overruled and it is therefore considered that said defendant go hence without day and recover of said plaintiff, his costs herein. Judgment is rendered against the plaintiff for the costs herein.

To all of the above findings, rulings and orders (excepting as to the finding and ruling on plaintiff's exhibit "D") the plaintiff excepts. As to the finding and ruling on plaintiff's exhibit "D", the defendant excepts.

(Signed) Charles A. Leach, Judge.

Approved (Signed) Vorys, Sater, Seymour & P., Attorneys for Plaintiff. (Signed) Butler and Summer, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 198] IN COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

[Title omitted]

AMENDED NOTICE OF APPEAL—Filed December 12, 1936

Plaintiff hereby gives notice of appeal to the Court of Common Pleas, to defendant and to the Court of Appeals of Franklin County, Ohio, Second District, from a final order rendered by the Court of Common Pleas of Franklin County, Ohio, in the above entitled case on the 3rd day of December, 1936, which order reads as follows:

"The parties by their attorneys come, by agreement waive a jury with the consent of the court and submit this cause to the court on the pleadings and evidence, and arguments and briefs of counsel, on consideration whereof the court finds on the issues joined, for the defendant.

"Whereupon, the plaintiff files: his motion for an order setting aside the decision rendered by the court and granting a new trial and for a judgment in his favor notwithstanding the decision of the court; and his motion that the court rule upon the admissability of plaintiff's exhibit "D" and defendant's exhibits numbered 1, 2, 3, 4, 5, 6, 7, 8, and 9 and that the court rule upon the motions made by plaintiff at the close of defendant's evidence and at the close of all of the evidence. And said motions are submitted to the court on consideration whereof the court finds that the motion for [fol. 199] an order setting aside the decision rendered by the court and granting a new trial and for a judgment in plaintiff's favor notwithstanding a new trial and for a judgment in plaintiff's favor notwithstanding the decision of the court is not well taken and should be overruled. The court further finds that each and all of said exhibits are admissable in evidence in this cause and further finds that the motions made by the plaintiff at the close of all the evidence should be overruled and that there were no motions made by the plaintiff at the close of the defendant's evidence.

"Wherefore, it is hereby ordered, adjudged and decreed that plaintiff's exhibit "D" and defendant's exhibits numbered 1, 2, 3, 4, 5, 6, 7, 8, and 9 be and the same are admitted in evidence in this cause and that the motions made by the plaintiff at the close of all of the evidence be and the same are hereby overruled and that the motion of the plaintiff for

an order setting aside the decision rendered by the court herein and granting a new trial, and for a judgment in plaintiff's favor notwithstanding the decision of the court, be and the same is hereby overruled and it is therefore considered that said defendant go hence without day and recover of said plaintiff, his costs herein. Judgment is rendered against the plaintiff for the costs herein.

"To all of the above findings, rulings and orders (Excepting as to the finding and ruling on plaintiff's exhibit "D") [fols. 200-201] the plaintiff excepts. As to the finding and ruling on plaintiff's exhibit "D", the defendant excepts."

Plaintiff-appellant represents that such appeal is on questions of law and *law and* fact arising from the errors in the proceedings in the Court of Common Pleas of Franklin County, Ohio.

(Signed) Vorys, Sater, Seymour & Pease, Attorneys for Plaintiff-Appellant.

[File endorsement omitted.]

[fol. 202] In Court of Common Pleas, Franklin County, Ohio

[Title omitted]

Objections to Bill of Exceptions—Filed December 24, 1936

The defendant makes the following objections to the bill of exceptions filed herein:

1. On page 3 in the third from the last line, the word "appeal" should be changed to "appellate".

2. On page 3 in the second from the last line, the word "appeal" should be changed to "appellate".

3. On page 7 in the ninth line, the word "five" should be changed to "give".

4. On page 7 in the twelfth line, the name "Don" should be changed to "Duane".

5. On page 14 the word "loan" appears in the fifth and seventh lines, the same should be changed to "lease".

6. The defendant's exhibit 6 introduced at pages 18 and 19 is not attached to the bill of exceptions. The same, of course, must be attached.

7. At pages 63 and 64, the defendant's exception to plaintiff's exhibit "D" is not shown. The exception as shown in the original entry is as follows:

"To all of the above findings, rulings and orders (excepting as to the finding and ruling on plaintiff's exhibit "D") the plaintiff excepts. As to the finding and ruling on plaintiff's exhibit "D", the defendant excepts."

Respectfully submitted, (Signed) Butler and Summer, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 203] In Court of Common Pleas, Franklin County, Ohio

No. 143633

Edward H. Titus, Plaintiff,

vs.

Lou C. Wallick, Defendant

Order Correcting Judgment—Filed February 24, 1937

It appearing to the court that due to a clerical error of omission the entry and order of this court made and entered on December 3, 1936, did not fully and completely set forth the findings, orders and judgment of this court in that it failed to include the Findings of Facts and Conclusion of Law made by the court "and failed to include a finding that the defendant did not offer in evidence an exhibit number 9;" and it further appearing to the court that in order to make said entry and order speak the truth it is necessary to correct the same by including therein the said Findings of Facts and Conclusions of Law and the exceptions thereto; and it further appearing to the court that said Findings of Fact and Conclusions of Law appear in a written memorandum of the court, to-wit: A written Decision of the Court rendered on the 19th day of September, 1936, and filed with

the original papers in this case, it is ordered that said entry and order of December 3, 1936, be and the same is hereby corrected and entered nunc pro tunc, as of December 3, 1936, and said entry and order is as follows, to-wit:

[fol. 204] The parties to this action having by their attorneys waived a jury with the consent of the court, and having submitted this cause to the court on the pleadings and the evidence and the arguments and briefs of counsel, and the court having considered the same finds on the issues joined for the defendant.

Whereupon the plaintiff filed: His motion for an order setting aside the decision rendered by the court and granting a new trial and for a judgment in his favor notwithstanding the decision of the court; and his motion that the court rule upon the admissibility of plaintiff's Exhibit D and defendant's Exhibits numbered 1, 2, 3, 4, 5, 6, 7, 8 and 9 and that the court rule upon the motions made by plaintiff at the close of defendant's evidence and the close of all of the evidence; and plaintiff also filed a motion requesting the court to state in writing the conclusions of fact found separately from the conclusions of law. Said motions were submitted to the court and upon consideration thereof the court finds that the motion for an order setting aside the decision rendered by the court and granting a new trial and for a judgment in plaintiff's favor notwithstanding the decision of the court is not well taken and should be overruled. The court further finds that the defendant did not offer an exhibit herein numbered 9 but finds that each and all of said exhibits excepting "defendant's exhibit number 9" are admissible in evidence in this cause and further finds that the motions made by plaintiff at the close of all of the evidence should be overruled and that there were no motions made by the plaintiff at the close of defendant's evidence. The court further finds that the motion requesting the court to state in writing the conclusions of fact found separately from the conclusions of law is well taken and does hereby sustain [fol. 205] the same and makes said findings of fact and conclusions of law as follows, to-wit:

"A. Findings of Facts

1. That by consideration of the Supreme Court in and for the County of New York in the Borough of Manhattan, City of New York, on the 1st day of May, 1934, the plaintiff recovered a judgment against the defendant in the sum of

three hundred seventy-seven thousand, eight hundred twenty-one 30/100 ($377,821.30) dollars, with interest from January 1, 1934, on the sum of two hundred fifty thousand, fourteen and 78/100 ($250,014.78) dollars, amounting to the sum of six thousand three hundred thirty-three and 71/100 ($6333.71) dollars, together with the cost duly taxed in the sum of four thousand nine hundred forty-eight and 20/100 ($4948.20) dollars, making in all the sum of three hundred eighty-nine thousand one hundred three and 21/100 ($389,103.21) dollars.

2. That said Supreme Court in and for the county of New York in the Borough of Manhattan, City of New York, was and is a court of general jurisdiction, duly created by the laws of the State of New York.

3. That no part of said judgment has been paid.

4. That the petition in this action in the court of Common Pleas of Franklin County, Ohio, was filed on August 20, 1934.

5. The defendant, Lou C. Wallick, appeared and took an actual part in the litigation which resulted in the judgment against him in the Supreme Court in and for the County of New York, in the Corough of Manhattan, City of New York, being the same judgment pleaded in the petition in this case.

[fol. 206] 6. That subsequent to May 1st, 1934, and prior to August 20th, 1934, (the date on which the petition and pending cause in the Court of Common Pleas in Franklin County was filed) London I. Wallick, a brother of the defendant in this case, instituted an action in the Supreme Court of the State of New York, County of New York, in an attempt to obtain from the plaintiff, Edward H. Titus, a part of the proceeds of plaintiff's judgment in the Courts of New York and filed a motion 'for an injunction pendent lite restraining me (Edward H. Titus, the defendant in that case and plaintiff here) from disposing of, encumbering, pledging, assigning or in any manner dealing with the monies received or to be received on account of the judgment entered in my (Edward H. Titus) favor against one Lou C. Wallick, in the office of the Clerk of the County of New York in the sum of $389,103.21.'

7. On the 17th day of August, 1934, the plaintiff herein, Edward H. Titus, under oath, made and filed an affidavit in

the said court in opposition to London I. Wallick's motion for the injunction. In said affidavit, so filed with the court, the plaintiff stated among other things, 'I told him (London I. Wallick) at that time (November 23rd, 1925, when agreement between London I. Wallick and Edward H. Titus for fifty-fifty split of proceeds of the New York litigation against Lou C. Wallick, was executed, record on appeal. Defendant's Exhibit No. 3, page 626); that I had already assigned any interest in the proceeds of said action against Lou C. Wallick to Walter L. Titus and Emilie F. Titus' (parenthetical insertion by the writer).

Edward H. Titus, plaintiff herein, further stated in said affidavit: 'The plaintiff's application for an injunction pendente lite should be denied. Prior to my execution of the instrument of November 23rd, 1925, I assigned my interest in my claim against Lou C. Wallick to Walter L. Titus, my brother, and Emilie F. Titus, my wife * * *. It is respect-[fol. 207] fully submitted that it does not lie within the jurisdiction of this court to now enjoin what has already been accomplished.'

8. That the facts as stated by the foregoing quoted excerpts from the said affidavit were and are true.

9. That at the institution of the suit in which the plaintiff recovered said judgment, and at all times during the litigation of said suit, the plaintiff was not the real party in interest and did not own or have any interest in the alleged claim against the defendant therein sued upon and plaintiff in and during said litigation suppressed and concealed that fact from the court and from the defendant.

10. Relative to the defense that the judgment in the New York proceedings is not responsive to the issues tendered by the pleadings, the court finds as a matter of fact from the evidence that such question was presented to the New York courts by the defendant in the proceedings in which the judgment was obtained.

B. Conclusions of Law.

1. Relative to the defense that the judgment in the New York proceedings is not responsive to the issues tendered by the pleadings, the court finds as a matter of law that since said question not only could have been but was presented to the New York courts in the proceedings in which the judg-

ment was obtained, that the same may not be relitigated here.

2. That the affidavit of Edward H. Titus filed in the Supreme Court of the State of New York, County of New York, (Finding of Fact No. 6) is properly admissible.

[fol. 208] 3. The court finds as a conclusion of law that the plaintiff herein is not the real party in interest in this action and has no right to maintain this action in his name.

4. That the plaintiff's judgment procured in the courts of New York was procured through fraud practiced upon the New York courts and upon the defendant, in that at the institution of the suit in which the plaintiff recovered said judgment, and at all times during the litigation of said suit, the plaintiff was not the real party in interest and did not own or have any interest in the alleged claims against the defendant therein sued upon and had no right to prosecute said suit on the same in his name.

5. That during said litigation in the courts of New York, the plaintiff suppressed and concealed the fact that a person or persons other than himself owned the claims upon which suit was brought in his name and were the real parties in interest in whose name or names alone suit could be rightfully prosecuted.

6. That the said judgment so obtained in the State of New York was and is impeachable there for fraud and it was and is to the same extent impeachable in the courts of Ohio.

7. That the finding and judgment herein will be for the defendant."

The plaintiff also filed his motion requesting the court to amend its findings of fact by finding:

1. Whether a reassignment of the claim was made by Walter L. Titus to Edward H. Titus on December 1, 1925;

2. Whether the defendant had knowledge of a reassignment from Gentch's affidavit submitted on the motion for a new trial and from the cross examination of Titus at the second trial.

[fol. 209] Upon consideration whereof, the court finds that said motion is not well taken and should be overruled.

Wherefore, it is hereby ordered, adjudged and decreed that plaintiff's Exhibit D and defendant's exhibits numbered 1, 2, 3, 4, 5, 6, 7 and 8 be and the same are admitted in evidence in this cause and that the motions made by the plaintiff at the close of all of the evidence be and the same are hereby overruled and that the motions of the plaintiff for an order setting aside the decision rendered by the court herein and granting a new trial and for a judgment in plaintiff's favor, notwithstanding the decision of the court be and the same are hereby overruled. It is further ordered, adjudged and decreed that plaintiff's motion requesting the court to state in writing the facts found separately from the conclusions of law is well taken and the same is hereby sustained and the facts found and stated as hereinbefore set forth. It is further ordered, adjudged and decreed that plaintiff's motion requesting the court to amend its findings of fact be and the same is hereby overruled. It is therefore considered that defendant go hence without day and recover of plaintiff his costs herein and judgment is rendered against plaintiff for the costs herein. To all of said findings, rulings and orders the plaintiff excepts (excepting as to the finding and ruling on plaintiff's Exhibit D). Plaintiff separately and severally excepts to each and every finding, ruling and order of the court and separately and severally excepts to each finding of fact and each conclusion of law. As to the ruling and finding on plaintiff's Exhibit D and the ruling and finding on plaintiff's motion to state in writing the conclusions of fact separately from the conclusions of law, the defendant excepts.

(Signed) Charles A. Leach, Judge.

Approved: Vorys, Sater, Seymour & Pease, Attorneys for Plaintiff. Butler and Summer, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 210] In Court of Appeals of Franklin County, Ohio

C. of A. # 2750

No. 143,633

Edward H. Titus, Pltf. Appellant,

vs.

Lou C. Wallick, Deft. Appellee

Docket and Journal Entries

1936, Dec. 8. Transcript of Docket & Journal Entries filed Common Pleas Papers To-wit (Pet. 1—Prec. 3—Sum. 2—Motion 7—Entry 12—Ans. 6—Memo. 5—Relpy 2— Demur 1—A. & O. Cert. 1—Request 1—Notice of App. 1—Misc. 6—Brief 3—50 in all.

1936, Dec. 12. Amended Notice of Appeal filed.

1937, Jan. 20. 6 Vol. of Bill of Exceptions filed.

1937, Jan. 21. Motion for extending time for filing. Appellants brief filed.

1937, Feb. 24. Entry giving appellant on or before February 25, 1937, to file brief. 5-251.

1937, Feb. 24. (3) Brief on behalf of Appellant filed.

1937, Feb. 24. Acknowledge of service by Atty., for appellee filed.

1937, Mar. 24. (3) Answer brief of Appellee filed.

1937, Mar. 25. Pro-f of Service receipt of copy of answers brief of Appellee filed.

1937, Apr. 20. (3) Plaintiff's Reply Brief filed.

1937, Apr. 29. Entry giving leave for Appellant to file, Reply Brief Instanter filed 5-272.

1937, Nov. 30. Decision rendered and filed.

1938, Feb. 14. Final entry affirming judgment of Common Pleas Court and ordering Special Mandate filed 5-349.

1938, Feb. 14. Mandate issued and filed 6-38.

1938, Mar. 4. Notice of Appeal to Supreme Court filed.

1938, Mar. 4. Precipe for transcript of Docket and journal Entries to be filed in Supreme Court filed.

[fols. 211-213] [Title omitted]

Judgment

This cause came on to be heard on the appeal from the judgment of the Court of Common Pleas and was argued

by counsel for the parties and submitted to the Court, and upon consideration the judgment of the Court of Common Pleas is hereby affirmed and it is ordered that appellee recover of appellant his costs herein taxed.

The Court finds there was reasonable grounds for the appeal.

And it is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution.

J. D. Barnes, Judge.

[fols. 214-217] In Court of Appeals of Franklin County

Clerk's Certificate

The State of Ohio,
Franklin County, ss:

I, J. Arthur Yoder, Clerk of the Court of Appeals, in and for said County, do hereby certify that the foregoing is a true transcript of the Docket and Journal Entries of said court in the above entitled cause, and that the said * * * entered into a written undertaking with approved suret * * *, conditioned to abide and perform the orders and judgment of the Supreme Court, and to pay all moneys, costs and damages which may be required or *or* awarded against said * * * by said Supreme Court, and I further certify that the papers herewith sent, numbered from One up to Seventy, are all the original papers and pleadings filed in the above cause of Edward H. Titus, Appellant-Plaintiff, against Lou C. Wallick, Appellee-Defendant.

In testimony *hwereof*, I have hereunto set my hand and affixed the seal of said Court of Appeals, at the Court House in Columbus, Ohio, on this 8 day of March A. D. 1938.

J. Arthur Yoder, Clerk, by E. E. Denune, Deputy.
(Seal.)

[fol. 218] In Court of Appeals, Franklin County, Ohio

[Title omitted]

Assignments of Error

1. The Court erred in rendering judgment for the defendant instead of the plaintiff.

2. The judgment is contrary to law.

3. The judgment is against the manifest weight of the evidence.

4. The Court erred in overruling the plaintiff's motion for judgment in his favor at the close of all the evidence.

5. The Court erred in its conclusion of law No. 2, to wit: "that the affidavit of Edward H. Titus filed in the Supreme Court of the State of New York, County of New York (finding of fact No. 6) is properly admissible" and admitting said affidavit (defendant's Exhibit No. 7) in evidence over the objection of plaintiff.

6. The court erred in its conclusion of law No. 3, that "the plaintiff herein is not the real party in interest in this action and has no right to maintain this action in his name."

7. The Court erred in its conclusion of law No. 4, to wit: "That the plaintif-'s judgment procured in the courts of New York was procured through fraud practiced upon the New York courts and upon the defendant, in that at the institution of the suit in which the plaintiff recovered said judgment, and at all times during the litigation of said suit, the plaintiff was not the real party in interest, and did not own or have any interest in the alleged claims against the defendant therein sued upon and had no right to prosecute [fol. 219] said suit on the same in his name."

8. The court erred in its conclusion of law No. 5, that "during said litigation in the courts of New York, the plaintiff suppressed and concealed the fact that a person or persons other than himself owned the claims upon which suit was brought in his name and were the real parties in interest in whose name or names alone suit could be rightfully prosecuted."

9. The court erred in its conclusion of law No. 6, that "the said judgment so obtained, in the state of New York was and is impeachable there for fraud and it was and is to the same extent impeachable in the courts of Ohio."

10. The court erred in its finding of fact No. 8, in that said finding is based upon incompetent, irrelevant and immaterial evidence, to wit, defendant's Exh-biti No. 7, and such finding is contrary to the manifest weight of the evidence.

11. The court erred in its finding of fact No. 9, to wit, that "at the institution of the suit in which the plaintiff recovered said judgment and at all times during the litigation of said suit, the plaintiff was not the real party in interest and did not own or have any interest in the alleged claim against the defendant therein sued upon and plaintiff in and during said litigation suppressed and concealed that fact from the court and from the defendant"—and such finding is contrary to the manifest weight of the evidence.

12. The court erred in overruling plaintiff's motion for a new trial.

13. The court erred in failing to find, though requested by plaintiff in writing, "whether a reassignment of the claim was made by Walter L. Titus to Edward H. Titus on December 1, 1925."

14. The court erred in failing to find, though requested by plaintiff in writing, whether the defendant had knowledge of the reassignment from Walter L. Titus to Edward H. Titus.

[fol. 220] In Court of Appeals of Franklin County, Ohio

(26971)

No. 2750

Edward H. Titus, Plaintiff-Appellant,

v.

Lou C. Wallick, Defendant-Appellee

Decision—Rendered on the 30th Day of November, 1937

Hornbeck, J.:

This appeal on question of law is prosecuted from a judgment in behalf of defendant. In the trial court the plaintiff's action was for judgment against defendant on a judgment of the Supreme Court of New York of date May 1, 1934, in favor of the plaintiff and against the defendant in the sum of $389,103.21.

The answer asse-ted three defenses: (1) that the judgment sued upon was not responsive to the issues tendered

by the pleadings; (2) that the plaintiff is not the real party in interest; (3) that the judgment in the New York Court was procured by fraud practiced upon the court and upon the defendant in that the plaintiff was not the real party in interest and suppressed and withheld this fact from the New York court.

The parties waived a jury, submitted the cause to the trial judge, who found that the defendant had failed to sustain the first defense, but entered judgment in his behalf on the second and third. The trial court upon request also made separate findings of fact and law.

There are fourteen errors assigned, which may be grouped under the general headings that the judgment is contrary to law and against the manifest weight of the evidence; the court erred in admitting certain evidence; in the conclusions of law and fact and in refusing to find "whether a re-assignment of the claim (upon which the judgment in New York was rendered) was made by Walter [fol. 221] L. Titus to Edward H. Titus on December 1, 1925."

The action in New York was instituted on December 22, 1925. It was twice tried in the lower courts, five times in the Appellate Division of the Supreme Court and once in the Court of Appeals, with the result that there is a voluminous record, much of which was eventually offered in the trial of the cause in this state.

The suit in New York was based upon a claim by the plaintiff that he was the owner of 250 shares of stock of the Secor Hotel Company of Toledo, Ohio, which were withheld from him by the defendant.

On March 31, 1924, plaintiff assigned his claim against the defendant to his brother, Walter Titus. On December 1, 1925, a short time before institution of the New York action, Walter Titus executed and delivered to the plaintiff an instrument in writing, designated an article of agreement.

After the judgment in behalf of plaintiff in New York, London I. Wallick, a brother of the defendant, who claimed to be entitled to a share in the proceeds of the judgment, instituted an action in New York and interposed therein a motion seeking an injunction pendente lite restraining the plaintiff from disposing of or collecting any of the money due on the judgment. Plaintiff herein asserted a defense to this suit and in support thereof tendered and filed an

affidavit of date August 17, 1934, which set out at consi
erable length the history of the transactions between t
plaintiff and the defendant and between London I. Walli
and the plaintiff relative to the subject matter of the acti
upon which judgment had been entered for the plaintiff a
among other things the following appeared:

"I told him (London I. Wallick) at that time (Nov. 2
1925) that I had already assigned any interest in the pr
ceeds of said action against Lou C. Wallick to Walter
Titus and Emilie F. Titus."
[fol. 222] "The plaintiff's application for an injuncti
pendente lite should be denied. Prior to my execution of t
instrument of November 23, 1925, (a written agreeme
between plaintiff and London I. Wallick) I assigned my i
terest in my claim against Lou C. Wallick to Walter
Titus. The plaintiff herein knew of this assignment befo
the instrument of November 23, 1925, was executed. It
respectfully submitted that it does not lie within the jur
diction of this court to now enjoin what has already be
accomplished." (Matter in parentheses ours.)

The trial court's opinion is before us. The conclusi
is there re-ched that the plaintiff, in the suit in New Yo
and in the action here, was not the real party in interest a
that the judgment in New York was secured by fraud pr
ticed by the plaintiff upon the court and the defendant,
suppressing the fact that he was not the real party in i
terest.

The voluminous briefs of counsel are directed to eve
question that arouse in the trial of the cause. We can n
within reasonable limitations, discuss all of the authorit
cited and discussed at length. We have, however, given
tention to all propositions advanced and have consider
the cases cited.

The question for our determination is: Did the tr
court have support for either or both of the conclusio
which were reached?

With the finding that the plaintiff was not the real pa
in interest in the actions in Ohio and in New York we are
accord upon a fair consideration of the status of the pla
tiff, his brother and defendant. The question respecting t
fraud practiced upon the court and the defendant in N
York, wherein the judgment was rendered for the plaint
[fol. 223] and against the defendant, and particularly t

right to assert it as a defense to the action in Ohio, is more difficult. We shall discuss the propositions in order.

The plaintiff originally was the sole owner of the claim against the defendant, upon which the action in New York was predicated. By the assignment to his brother, Walter Titus, the plaintiff relinquished any and all interest which he had in the claim. Under the first assignment, then, the sole and only right in any manner to collect the claim from the defendant was in Walter Titus. If the rights of the parties are fixed by the instrument termed "Article of Agreement" and Walter Titus transferred any such legal or equitable interest or both in his claim to the plaintiff as would entitled him to maintain an action in his own name in New York, then he was a proper party in interest there and a proper party in interest here. This is true without respect to the assertions of fact made in the affidavit of plaintiff in the injunction proceeding in New York, because the plaintiff, though he may have misinterpreted the import of the agreement, could not change its effect in law.

The agreement, after preliminary recitations setting forth the nature of the claim and its former assignment by plaintiff to his brother, Walter, recites that said assignment was delivered upon the oral understanding that Walter would use any funds that might be derived therefrom to pay off and discharge certain indebtedness of Edward, later set out. It is stated that Edward wishes to institute an action against Lou C. Wallick to recover stock and that Walter is willing to re-assign the claim to Edward upon terms and conditions thereafter stated. Consideration of $1.00 is acknowledged. Then follow the conditions under which the re-assignment is made, as follows:

1. Walter sells, assigns and transfers all his right, title and interest to the claim against Lou C. Wallick and all his [fol. 224] right, title and interest to 250 shares of the capital stock of the Secor Hotel Company to Edward Titus.

2. Walter appoints Edward his true and lawful attorney irrevocably for him and in his name and stead but for Edward's benefit to sell, assign, transfer, set over, pledge, compromise or discharge the whole, or any part, of said claim, and to * * * collect", receive and sue for said stock or for any moneys which may grow due, upon said claim, and to substitute one person or more with like powers * * *.

3. Edward agrees that he will receive, as the property
Walter, any stock certificates, checks, drafts or money a
plicable to said claim, which shall at any time come into t
possession or control of Edward and will immediately e
dorse, transfer and deliver same to Walter to have and
hold the same and every part thereof for the following us
and purposes:

(a) To pay all expenses incurred in connection with t
collection of claims.

(b) To repay one-half of the balance thereof to Emilie
Titus • • •.

(c) To reimburse Walter for one-half of any and a
moneys heretofore or hereafter paid out by him in dischar
ing debts and liabilities incurred by James L. Titus • •

(d) To pay in full, if the residue of the proceeds is suf
cient, principal and interest on a note for $11,361.25, pa
able to Margaret G. Titus.

(e) To pay all indebtedness due or to become due fro
Edward to Walter.

(f) To pay to Edward the surplus remaining after pa
ment and discharge of obligations theretofore recited.

If this instrument stopped with the subject matter of Co
dition 1, clearly it would be a complete re-assignment. Tha
part which is contained in Condition 2 is difficult of unde
standing. The first part thereof is clearly a designation o
[fol. 225] power of attorney to Edward from Walter and i
unqualified and all that is to be done is to be done by the a
torney, Edward, for and on behalf of Walter. Then, no
withstanding the unqualified language just discussed, fo
lows the provision that the action of Walter in selling, as
signing or transferring the claim is for Edward's benefi
The third heading provides that any avails of the settle
ment of the claim which come into the possession of Edward
he shall receive for Walter and be immediately turned bac
to Walter. The only reconcilable construction that can b
put upon this instrument up to this point is that Walter gav
Edward power of attorney to collect in any manner th
claim which Walter owned and immediately upon collectio
to turn over the proceeds of the collection to Walter fo
the purposes thereafter set forth in the agreement. Th

only interest that Edward had by the agreement in the proceeds of the judgment after payment of said proceeds to Walter was a contingent right to receive a share thereof after all payments were made, as provided in (a), (b), (c), (d), and (e), though it is true the payments in these subheadings were to be made to liquidate the indebtedness of Edward. Upon this whole instrument, then, over and beyond the power of attorney granted to Edward he had no interest whatever except the contingency provided for in (f). The action instituted in New York and in Ohio did not proceed as one wherein Edward was plaintiff as attorney for Walter as provided in Condition 2 of the agreement, but in his own name and right. The power of attorney will not support the action in the form in which it has been prosecuted, nor was the contingent interest of Edward such as that it would authorize him in his own name to be a proper party plaintiff.

Sections 11241 and 11244, G. C., are, insofar as they relate to the instant action, substantially the same as Section 210 of the Civil Practice Act of the State of New York, [fol. 226] which provides that:

"An action must be prosecuted in the name of the real party in interest except that * * * a trustee of an express trust, * * * may sue without joining with him the person for whose benefit the action is prosecuted."

And in Ohio the exception has been considered in Brown v. Ginn, 66 O. S., 316, which holds that:

"In order to constitute one a trustee of an express trust within the meaning of the statute, the right and duty to bring the action must be incidental to the other powers and duties under the assumed trust, and the authority must not be confined simply to the bringing of an action to collect the subject of the contract which purports to create the trust, and to pay the next proceeds over to the assignor."

See also Hadden v. Rowe, 3 O. Opinions, 68 (130 O. S., 10)

To like effect is Spencer v. Standard Chemicals and Metals Corporation, 143 N. E. 651, (237 N. Y., 479), Syllabus 1:

"Under Code Civ. Proc. sections 111, 113 (Civil Practice Act, section 210), assignee must have legal or equitable title to thing assigned to sue in his own name as real party in in-

terest, irrespective of consideration paid, purpose of assignment, or use to be made of proceeds collected."

Andrews, Judge, in the opinion at page 652 quotes from Cumings v. Morris, 25 N. Y., 625:

"The real party in interest has been defined by this court: "If, as between the assignor and the assignee, the transfer is complete, so that the former is divested of all control and right to the cause of action, and the latter is entitled to control it and receive its fruits, the assignee is the real party in interest." "

But it is claimed that the Court erred in refusing to find whether a re-assignment of the claim (Upon which the judgment in New York was rendered) was made by Walter L. Titus to Edward H. Titus on December 1, 1925. The Court [fol. 227] made no specific finding in the separate findings of fact and law on this matter though the agreement was discussed at length and construed in the opinion.

There can be no dispute as to the execution of the article of agreement at the time and place and in the manner appearing in the record. Its effect is the subject of dispute. It is determined in the findings of fact that the statements in the affidavit as to the assignment by Edward to Walter were made and at the time of the institution of plaintiff's suit in New York he had no such interest in the claim sued upon as to be the real party in interest. There is nothing in the record which will permit the inference that there has been any change in the status of plaintiff since the making of the affidavit. As we understand it, the Court further held that if the plaintiff had, under the agreement, such an interest as would have authorized him to institute the *suit*, it did not establish the claim that he was the proper party plaintiff because having taken the position in his affidavit that he had no such right which may have been based upon facts not appearing in the record, and having failed at any subsequent time to deny the subject matter of the affidavit, it should be accepted as fixing the true relationship of the parties when the action was instituted in New York. In this conclusion we do not concur. Having found that the statements in the affidavit were true, it must be accepted that the only specific reference to an assignment was as to the one made prior to November 23, 1925. This could only relate to

the assignment of March 31, 1924. This time is fixed by the language of the defendant,

"The plaintiff knew of this assignment before the instrument of November 23, 1925, was executed."

The last quoted part of the affidavit,

"It is respectfully submitted that it does not lie within the jurisdiction of this court to now enjoin what has already been accomplished,"

[fol. 228] is but a conclusion of the affiant that his status was fixed as of date March 31, 1924, and not by any subsequent act. The article of agreement having been executed subsequent to November 23, 1925, and before suit would support the right of plaintiff to institute his suit in New York if it clothed him with authority so to do. But the effect of the article of agreement was not to be determined by a finding of fact but by judicial construction as a matter of law. At law it bears but one construction and that is against the claim of the plaintiff that he was the real party in interest in the action in New York. If the findings of fact made are correct and supported by the record, then the failure to make specific finding of the effect of the article of agreement would not be prejudicial to the plaintiff, if the judgment reached was in accord with the findings properly made. It matters not whether in the statement in the affidavit, plaintiff correctly or incorrectly interpreted his status under the article of agreement. If the former, then, though stating the truth, it was at variance with his claim in the New York suit. This was the view taken by the trial court and is a proper inference to be drawn.

It is further urged that the affidavit was not properly admitted in evidence but if admissible should not be construed to amount to an estoppel and preclude the plaintiff from an explanation of the language therein, which the court construed as determinative that the plaintiff was not the real party in interest. No case is cited supporting the proposition that the affidavit is not admissible and all of the cases cited by both parties on the subject support its admissibility.

The claim that the court considered the affidavit as conclusive and bind- upon the plaintiff and that no explanation would be permitted is not well made. True, the judge cited

some cases, the tenor of which is to — effect that the statements in the affidavits were conclusive against the plaintiff [fol. 229] but he did not rely upon this rule but went further and held that if explanation was proper none was forthcoming.

In the view of the trial court it is immaterial whether the statements in the affidavit amounted to estoppel or were merely admissions of evidential value only. We are inclined to the view that the facts set forth in the affidavit were subject to the explanation. But the plaintiff, though cognizant of the purpose for which the affidavit was introduced, namely, to support the second and third defenses of the answer, did not, by deposition or by appearance as a witness at the trial, attempt to explain the subject matter of the affidavit which was under consideration. On the contrary, the plaintiff stands upon the record and urges that his position as set forth in the affidavit is not inconsistent with his right to maintain the action in New York and the action here.

But is is said that plaintiff was not given opportunity to explain the affidavit. We find no support whatever in the record for this position. The trial court at all times indicated a willingness to extend to the parties full opportunity to produce any proof which was available. The plaintiff was put on notice that the affidavit might be accepted in evidence. If so, it should have been apparent to the plaintiff that it would be employed as supporting the second and third defenses of the answer. It then became the obligation of the plaintiff to meet this possible development of proof.

The trial court committed no prejudicial error in holding that the plaintiff was neither in Ohio nor in New York a real party in interest in the respective actions here and there.

The next major question and the most difficult one is whether or not the statement made by the plaintiff in the affidavit in the collateral injunction proceeding in New York disclosed the practice of such a fraud against the Court [fol. 230] and the defendant in the original action as would preclude the maintenance of the instant action upon the judgment in New York.

If the plaintiff is chargeable with such fraud as that it could be set up successfully against the judgment in New

York, where it was rendered, it may be set up in Ohio to defeat the rendition of a judgment for the plaintiff here. 34 C. J., 1126, 1153.

"All defenses which are admissible against a judgment where it was pronounced are equally admissible in actions upon it in another state." Freeman on Judgments (5th Edition) Third Volume, page 2992. Pelton v. Pelton, 13 O., 209; Arndt v. Arndt, 15 O., 33; Armstrong v. Armstrong, 117 O. S., 556.

Freeman on Judgments fully and comprehensively considers fraud as a ground of attack on judgments of sister states at pages 2890, 2891 and 2892, Third Volume:

"But in view of the requirement that a sister state judgment shall be given the same effect as it has where rendered, the question whether it is collaterally impeachable for fraud, except where the matter is jurisdictional, ought to depend entirely upon whether such an attack may be made in the state of its rendition; and this is what some of the cases hold. If it is impeachable there for fraud, it is to the same extent impeachable elsewhere."

"While the United States Supreme Court has indulged in dicta to the effect that such a judgment may be attacked for fraud, as well as lack of jurisdiction, other dicta of the same court are to the contrary, and some of its decisions contained the general statement that the plea of fraud is not available as an answer to an action on a judgment. We apprehend, however, that these latter decisions are inapplicable in those states in which the distinction between law and equity is attempted to be abolished, and equitable as well as legal defenses are, when properly pleaded, admissible in actions at law."

[fol. 231] And the same work at page 2895:

"Hence relief can not ordinarily be had in another state on the ground of perjury and conspiracy in prosecuting the action in which the judgment was given, nor because of any fraud which might have been urged against the maintenance of the former action. The fraud which may be shown is fraud in the procurement of the judgment or decree rather than fraud in the cause of action. As to what constitutes such fraud the rule is doubtless the same as is applied

where equitable relief on this ground is sought against it in an independent action."

Cases are cited which support the text.

We are cited to Phillips vs. Griffin, 236 App. Div. (N. Y.) 206, and particularly to page 211; Boston & Maine R. Co. v. D. & H. Co., 268 N. Y., 382, 391; Jacobowitz v. Herson, 268 N. Y., 130; the Matter of Holden, 271 N. Y., 212; U. S. v. Throckmorton, 98 U. S. 61; 15 R. C. L., 762; Wright v. Saltmarsh, 50 Pac. (2nd), 694, which general-y go to the propositions that under the full faith and credit clause of the federal constitution a judgment of a sister state may only be assailed for want of jurisdiction over either the person or the subject matter or for extrinsic fraud", the effect of which prevents a party from having a trial or from presenting the merits of his case to the court. It can exist only in such cases where it operates to keep a party away from Court by reason of a promise of compromise, or where a party is kept in ignorance, * * * or where an attorney sells out his client's interest, or where there is corruption of or collusion with the court". This latter statement is quoted from U. S. v. Throckmorton, supra.

We have searched the authorities cited by both parties in vain for any set of facts parallelling those found in the instant case and our independent research affords no case directly in point. In U. S. v. Throckmorton, supra, decided in 1878, there was no question touching fraud in suppression of the infirmity of a party. The court had no occasion to give consideration to such a situation *ads* necessarily [fol. 232] confined its observations to the law as applied to the facts there appearing. The fraud upon which the plaintiff sought a decree setting aside and declaring the judgment to be void related to the subject matter of proof respecting the merits of the case. There has been no exception to the rule that a judgment recovered by means of false and fraudulent testimony of the prevailing party or other witnesses as to subject matter at issue is no ground of defense to an action upon the judgment or to enjoin its enforcement. 34 C. J., 1153; Pomeroy Equity Jurisprudence, Vol. 5, page 4683.

In Matter of Holden, supra, one Nelson had been awarded a sum of money as the owner of a ⅝ interest by virtue of assi-nments from the owner of certain property which has

been condemned by the City of New York. Thereafter, a proce-ding was instituted to vacate and set aside the order directing the payment to Nelson upon the claim that Nelson's assignor had procured the assignments from the unknown owners by fraud and that this constituted a fraud upon the court. The court there found that the fraud which was asserted was between the original parties in some remote transaction; that the assignee was the legal owner of the claims assigned; that the validity of the assignments could not be asserted in the manner attempted and the relief sought was denied. The status of Nelson, with legal title to the subject matter of the assignments upon which his right of action was predicated, is quite different from the status of the plaintiff here, as found by the trial court.

In Martion Corely, etc., v. N. Y., and Harlem R. R. Co., (N. Y.), 12 App. Div., 409, at page 410 and 411 it is said:

"On the ground of fraud practiced upon the court and jury during the trial, the judgment should be set aside and a new trial granted. It was said in Ward v. Town of Southfield (102 N. Y., 287) by Earl, Jr.: 'A party defeated in a litigation may appeal from the judgment or move for a new trial, and, in a proper case, to vacate and set aside the judgment. These remedies are generally ample to pro-[fol. 233] tect all Parties. But where there is fraud not in the subject of litigation, nor in anything which was involved in the issue tried, but fraud practiced upon a party, or upon the court during the trial, or in prosecuting the action, or in obtaining the judgment may be attacked collaterally and on account thereof set aside and vacated.' This is a case of 'fraud practiced upon a party • • • during the trial'; and if it is ground for collateral attack, it is certainly ground for setting aside the judgment in the same action, as the Ward case plainly indicates." See also Bartges v. O'Neill, 13 O. S., 72, 76; Board of Education v. Guy, 64 O. S., 434, 445 and 447 at end.

If the formal sworn statements in the affidavit of the plaintiff were true on the motion for injunction pendente lite in the London Wallick suit in New York, then, clearly, the plaintiff was without right or authority to institute the suit in New York against the defendant. The trial judge was well within his province in finding that the statements in the affidavit were true and, likewise, that the plaintiff at all

times, from the beginning of the suit against the defendant and during its prosecution, knew of his infirmity as a party plaintiff.

Plaintiffs assertions in the affidavit may have been based upon an appreciation of his rights under the article of agreement, viz., that they were no greater nor less than under the assignment to his brother, or they may have been made with the purpose of withholding any rights which plaintiff may have believed he possessed by virtue of the agreement. Whatever motivated the plaintiff to say what he did in the affidavit, the purpose and effect of his position in the action against the defendant in New York is the same.

It is our judgment that the trial court properly applied the law in the determination that the plaintiff suppressed and concealed from the court and from the defendant the [fol. 234] fact that he was not a proper party plaintiff and the real party in interest in the action against the defendant in New York, and in finding that such conduct was extrinsic fraud in prosecuting the cause to judgment, which supported the third defense of the answer.

It is further claimed by the plaintiff that the facts upon which the trial court predicated the finding of fraud against the plaintiff were known or should have been known to the defendant during the progress of the litigation in New York and that it is too late to assert them now. A consideration of the record on this question does not support the claim of the plaintiff.

The judgment will be affirmed.

(Barnes, P. J., and Geiger, J., concurring.)

Appearances:

Vorys, Sater, Seymour & Pease, Byron E. Ford, Thomas I. Sheridan, Lewis F. Glaser, Aaron Frank, of Counsel, Attorneys for Plaintiff-Appellant.

Butler & Summer, Attorneys for Defendant-Appellee.

[fol. 235] In Court of Appeals of Franklin County, Ohio

[Title omitted]

Judgment—Filed February 14, 1938

This cause came on to be heard on the appeal from the judgment of the Court of Common Pleas and was argued

by counsel for the parties and submitted to the Court, and upon consideration the judgment of the Court of Common Pleas is hereby affirmed and it is ordered that appellee recover of appellant his costs herein taxed.

The Court finds there was reasonable grounds for the appeal.

And it is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution.

(Signed) J. D. Barnes, Presiding Judge.

Approved by Vorys Sater Seymour, Attorneys for Appellant. Butler and Summer, Attorneys for Appellee.

[File endorsement omitted.]

[fol. 236] In Court of Appeals of Franklin County

Mandate

Judgment Affirmed

Court of Appeals of Franklin County, State of Ohio, January Term, A. D. 1938

At a term of the Court of Appeals, within and for the County of Franklin, in the State of Ohio, begun and held at Columbus, Ohio, on the 14th day of February A. D. 1938 before Hon. J. D. Barnes Presiding Judge, and Hon. R. G. Hornbeck and Hon. F. W. Geiger Judges, among other proceedings then and there had by and before said Court, as appears by its Journal, is the following, to-wit:

No. 2750

Edward H. Titus, Plaintiff in Error,

—

Lou C. Wallick, Defendant in Error

This cause came on to be heard on the appeal from the judgment of the Court of Common Pleas and was argued by counsel for the parties and submitted to the Court, and upon consideration the judgment of the Court of Common Pleas

is hereby affirmed and it is ordered that appellee recover of appellant his costs herein taxed.

The Court finds there was reasonable grounds for the appeal.

And it is ordered that a special mandate issue out this Court directing the Court of Common Pleas to carry this judgment into execution.

J. D. Barnes, Judge.

Filed in Court of Appeals Feb. 14, 1938.

[fol. 237] I, Arthur Yoder Clerk of the Court of Appeals of Franklin County, Ohio do hereby certify that the foregoing Entry is truly taken and correctly copied from the Journal of said Court of Appeals.

Witness my hand and the Seal of said Court of Appeals at Columbus, Ohio, this 14 day of February A. D. 1938.

J. Arthur Yoder, Clerk.

THE STATE OF OHIO, COURT OF APPEALS OF FRANKLIN COUNTY

To the Honorable Court of Common Pleas, within and for the County of Franklin, Greeting:

We do hereby command you, that you proceed, without delay, to carry the within and foregoing Judgment of our Court of Appeals of Franklin County, in the case of Edward H. Titus, vs. Lou C. Wallick, into execution, the Petition in Error herein and heretofore filed, to the contrary notwithstanding.

Witness my signature as Clerk of our said Court of Appeals, and the Seal thereof, at Columbus, Ohio, this 14 day of February A. D. 1938.

J. Arthur Yoder Clerk, by E. E. Denune, Deputy.

(Filed Supreme Court Mar. 6, 1938.)
26971.
No. 2750.
Doc. 6, Page 38.

Court of Appeals of Franklin County, Ohio. Edward T. Titus vs. Lou C. Wallick. Special Mandate Error.—Judgment Affirmed. Filed in Common Pleas Court Feb. 14, 1938. J. Arthur Yoder, Clerk, E. E. Denune, Deputy. Vorys, Sater. Seymour & Pease, Pltff's Att'y. Butler & Summer, Deft.'s Att'y.

[fol. 238] In Court of Appeals of Franklin County, Ohio

[Title omitted]

Notice of Appeal—Filed March 4, 1938

The above named plaintiff and appellant hereby gives notice of appeal to the Supreme Court of Ohio from a judgment rendered by the Court of Appeals in the above entitled cause and numbered 2750 on the dockets of said court which said judgment was rendered on the fourteenth day of February, 1938, affirming the judgment of the Court of Common Pleas of Franklin County, Ohio, entered on the third day of December, 1936, wherein said Court of Common Pleas rendered judgment in favor of said Lou C. Wallick, defendant and appellee, and against said Edward H. Titus, plaintiff and appellant.

Said appeal is on questions of law and is taken to the Supreme Court:

(a) In a case involving a debatable, constitutional question;

(b) On condition that a motion to certify be allowed by the Supreme Court.

(Signed) Hartman, Sheridan & Tekulskey, Aaron Frank, Lewis F. Gearer, New York City, N. Y.; Vorys, Sater, *Leyanon* and Pease, 52 East Gay Street, Attorneys for Plaintiff and Appellant.

[File endorsement omitted.]

[fol. 239] In Supreme Court of Ohio

Docket and Journal Entries

No. 26971

Title:

Edward H. Titus, Plaintiff and Appellant,

vs.

Lou C. Wallick, Defendant and Appellee

Action:

Motion for an order directing the Court of Appeals of Franklin County to certify its record.

Docket and Journal Entries—Continued

Appeal from the Court of Appeals of Franklin County

Counsel:

For appellant, Hartman, Sheridan & Tekulsky, Lewis F. Glaser, Aaron Frank, New York, N. Y., Vorys, Sater, Seymour & Pease, Columbus, Ohio;

For appellee, Butler & Summer, Columbus, Ohio.

Memoranda of Pleadings, etc., Filed, Writs Issued, Judgments, Orders and Decrees

March 4, 1938. Notice of Appeal and proof of service filed.

March 8, 1938. Court of Appeals Transcript, Original Papers and Bill of Exceptions filed.

March 8, 1938. Cause docketed on appeal as of right.

March 8, 1938. Motion for an Order to Certify record, Assignments of errors, appellants printed brief on motion and proof of service filed.

March 17, 1938. Motion by appellee to dismiss appeal of right and proof of service filed.

April 5, 1938. Printed brief of appellee on motions & affidavit of service filed. 4/17/38 proof of service filed.

April 27, 1938. Motion for an order directing the Court of Appeals of Franklin County to certify its record overruled. Journal 35, page 62.

April 27, 1938. Motion by appellee to dismiss appeal as of right, sustained. Journal 35, page 62.

April 27, 1938. Dismissed, no debatable constitutional questions involved. Journal 35, page 68.

May 4, 1938. Original papers and bill of exceptions returned to County Clerk.

May 4, 1938. Mandate issued.

May 4, 1938. Certified copy of entry sent Clerk.

May 10, 1938. Original papers and bill of Exceptions resubmitted.

[fol. 240] June 1, 1938. Praecipe for record for U. S. Supreme Court filed. 6/10/38 withdrawn.

June 8, 1938. Amendment to praecipe filed. 6/10/38 withdrawn.

June 11, 1938. New Praecipe for record for U. S. Supreme Court filed.

Journal Entries

Order

Wednesday, April 27, 1938. Motion for an order directing the Court of Appeals of Franklin County to certify its record. It is ordered by the Court that this motion be and the same is hereby overruled. Journal 35, page 62.

Order

Wednesday, April 27, 1938. Motion by appellee to dismiss appeal filed as of right. It is ordered by the Court that this motion be and the same is hereby sustained. Journal 35, page 62.

Judgment

Wednesday, April 27, 1938. Appeal from the Court of Appeals of Franklin County. This cause came on to be heard upon the transcript of the record of the Court of Appeals of Franklin County, upon the motion of the appellee to dismiss the appeal, filed as of right herein, and was argued by counsel. On consideration whereof, it is ordered and adjudged that said appeal be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said cause. It is further ordered and adjudged that the appellee recover from the appellant his costs herein expended, taxed at $—. Ordered, That a special mandate be sent the Court of Common Pleas of Franklin County, to carry this judgment into execution. Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals of Franklin County, "for entry". Journal 35, page 68.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 241] In Supreme Court of Ohio

[Title omitted]

Notice of Appeal—Filed March 4, 1938

The above named plaintiff and appellant hereby gives notice of appeal to the Supreme Court of Ohio from a judg-

ment rendered by the Court of Appeals in the above entitled cause and numbered 2750 on the dockets of said court which said judgment was rendered on the fourteenth day of February, 1938, affirming the judgment of the Court of Common Pleas of Franklin County, Ohio, entered on the third day of December, 1936, wherein said Court of Common Pleas rendered judgment in favor of said Lou C. Wallick, defendant and appellee, and against said Edward H. Titus, plaintiff and appellant.

Said appeal is on questions of law and is taken to the Supreme Court:

(a) In a case involving a debatable, constitutional question:

(b) On condition that a motion to certify be allowed by the Supreme Court.

(Signed) Herman, Sheridan & Tekulsky, Aaron Frank, Lewis F. Glaser, New York City, N. Y.; Vorys, Sater, Seymour and Pease, 52 East Gay Street, Columbus, Ohio, Attorneys for Plaintiff and Appellant.

Acknowledgment

March 4, 1938.

The undersigned counsel for defendant and appellee, hereby acknowledge service upon us of copy of Notices of Appeal filed in the Supreme Court and Court of Appeals.

(Signed) Butler and Summer.

[File endorsement omitted.]

[fol. 242] IN SUPREME COURT OF OHIO

[Title omitted]

ASSIGNMENTS OF ERROR—Filed March 8, 1938

Edward H. Titus, appellant, for his assignments of error says that the judgment entered by the Court of Appeals in the above entitled cause on the fourteenth day of February, 1938 and numbered 2750 on the dockets of said court is erroneous and against the just rights of appellant in each of the following respects:

1. The Court of Appeals erred in affirming the judgment of the Common Pleas Court of Franklin County, Ohio, in the above entitled cause, which said judgment was in favor of Lou C. Wallick, defendant and appellee, and against Edward H. Titus, plaintiff and appellant.

2. The judgment of said Court of Appeals and the judgment of the said Court of Common Pleas are each in violation of Article IV, Section 1, of the Constitution of the United States, in that each of said courts by its said judgment failed and refused to give to the judgment secured by appellant, Edward H. Titus, against appellee, Lou C. Wallick, in the courts of the State of New York, which judgment is the basis of this action, the full faith and credit required to be given said judgment by said Article IV, Section 1, of the Constitution of the United States and the statutes of Congress enacted pursuant thereto.

[fol. 243] 3. The Court of Appeals erred in affirming and in not reversing the judgment and conclusion of law of the Court of Common Pleas, towit, that appellant's judgment against appellee procured in the courts of the State of New York was procured through fraud practiced by appellant upon the New York Courts and upon appellee.

4. The Court of Appeals erred in affirming and in not reversing the judgment and conclusion of law of the Court of Common Pleas, towit, that at the institution of the suit in which appellant recovered said judgment in the State of New York and at all times during the litigation of said suit, appellant was not the real party in interest and did not own or have any interest in the alleged claims there sued upon and had no right to prosecute said suit in the name of appellant.

5. The Court of Appeals erred in affirming and in not reversing the judgment and conclusion of law of the Court of Common Pleas, towit, that appellant suppressed and concealed from the courts of the State of New York the fact that a person or persons other than himself owned the claims on which appellant's suit was brought in said courts and were the real parties in interest in whose name or names alone said suit could be rightfully brought and thereby committed a fraud upon said courts of the State of New York.

6. The Court of Appeals erred in affirming and in not reversing the judgment and conclusion of law of the Court

of Common Pleas, towit, that said judgment so obtained b
the appellant against appellee in the courts of the State
New York was and is impeachable in said State of Ne
York for fraud and therefore is impeachable for fraud
[fol. 244] the State of Ohio.

7. The Court of Appeals erred in not reversing the jud
ment of the Court of Common Pleas and in not enteri
judgment for the appellant.

8. The Court of Appeals erred in not reversing the jud
ment of the Court of Common Pleas and in not enteri
judgment for the appellant, Edward H. Titus, on the grou
that the judgment of the Court of Common Pleas is contra
to the manifest weight of the evidence and that there w
no evidence in the record to support said judgment.

9. The judgment of the Court of Appeals affirming t
judgment of the Court of Common Pleas is contrary to la

Wherefore, appellant prays that the judgment of sa
Court of Appeals of Franklin County, Ohio, and the jud
ment of said Court of Common Pleas of Franklin Count
Ohio, may both be reversed and judgment directed to
entered in said cause for Edward H. Titus, appellant.

(Signed) Hartman, Sheridan & Tekulskey, Aaro
Frank, Lewis F. Glaser, Vorys, Sater, Seymour an
Pease, Attorneys for Edward H. Titus, Appellan

[File endorsement omitted.]

[fol. 245] IN SUPREME COURT OF OHIO

[Title omitted]

MOTION TO CERTIFY—Filed March 8, 1938

Now comes Edward H. Titus, Plaintiff and Appellan
herein, and represents that at the January Term of th
Court of Appeals of Franklin County, Ohio, to-wit: On th
fourteenth day of February, 1938, in an action pending i
said court wherein this appellant was plaintiff and appellan
and the said appellee was defendant and appellee said cou
rendered a judgment in favor of said defendant and appelle
and against this plaintiff and appellant, affirming a judg
ment rendered in favor of said defendant and appellee i
the Common Pleas Court of said county.

Twelve copies of a printed brief containing statements of the questions presented and a statement of the case as required by the rules of this court being filed herewith and to which reference is here made.

Plaintiff and appellant further represents that he has heretofore filed Notice of Appeal in said Court of Appeals of Franklin County, Ohio, and a similar notice in this court as required by law; and further that said case is one of both public and great general interest and that prejudicial error has intervened in the proceedings had in said Court of Appeals all within the meaning of Article IV, Section 2 of the Constitution of the State of Ohio and by reason thereof this [fol. 246] Honorable Court has jurisdiction to and ought to review said judgment. And said plaintiff and appellant also files herewith his assignments of error as required by law and the rules of this court.

Wherefore, said plaintiff and appellant makes application for an order directing said Court of Appeals to certify its record to the Supreme Court.

(Signed) Hartman, Sheridan & Tekulsdy, Aaron Frank, Lewis F. Glaser, New York City, N. Y.; Vorys, Sater, Seymour and Pease, 52 East Gay Street, Columbus, Ohio, Attorneys for Plaintiff and Appellant.

Service of a copy of the foregoing motion, together with copies of Notice of Appeal, assignments of error and brief of Plaintiff and Appellant, is hereby acknowledged this 8th day of March, 1938.

(Signed) Butler and Summer, 8 East Broad Street, Columbus, Ohio, Attorneys for Defendant and Appellee.

[File endorsement omitted.]

[fol. 247] IN SUPREME COURT OF OHIO

[Title omitted]

MOTION TO DISMISS APPEAL AS OF RIGHT—Filed March 17, 1938

Now comes Lou C. Wallick, defendant and appellee, and respectfully moves this Court for an order dismissing the appeal as of right filed in this Court by Edward H. Titus,

plaintiff and appellant, for the reason that no debatable constitutional question is involved in this case.

(Signed) Butler and Summer, 8 East Broad Street, Columbus, Ohio, Attorneys for Defendant and Appellee.

Acknowledgment

Notice of intention to file the foregoing motion and service and filing of the same by receipt of a copy thereof is hereby acknowledged this 16th day of March, 1938.

(Signed) Vorys, Sater, Seymour and Pease, Attorneys for Plaintiff and Appellant.

[File endorsement omitted.]

[fols. 248-249] IN SUPREME COURT OF OHIO

AUTHENTICATION OF RECORD

STATE OF OHIO,
City of Columbus, ss:

I, Seba H. Miller, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing is a true, full, complete and correct transcript of the record in the above entitled cause, being copies of the originals of documents on file in this office in the within entitled cause and a transcript of the complete docket and journal entries in the Supreme Court of Ohio as therein certified, all as per precipe for record filed in this cause in this court. I further certify that no opinion was rendered by the Supreme Court of Ohio in the within entitled cause.

Witness my hand and the seal of said The Supreme Court of Ohio, affixed at Columbus, Ohio, this 5th day of July, A. D. 1938.

Seba H. Miller, Clerk of the Supreme Court of Ohio.
(Seal The Supreme Court of the State of Ohio.)

[fol. 250] IN SUPREME COURT OF THE UNITED STATES

MOTION OF RESPONDENT DESIGNATING ADDITIONAL PORTIONS OF THE RECORD TO BE PRINTED—Filed October 24, 1938

Now comes the respondent, Lou C. Wallick by his attorneys and respectfully moves this honorable court for an

order requiring portions of the record to be printed in addition to those portions set forth in the motion of the petitioner to print abbreviated record which latter motion has been granted by this honorable court, the additional portions being as follows:

1. The motion and memorandum in support thereof of the plaintiff filed in the Common Pleas Court of Franklin County, Ohio February 20, 1935.

2. The answer memorandum of the defendant filed in the Common Pleas Court of Franklin County, Ohio March 19, 1935.

3. The entry and order filed April 29, 1935 in the Common Pleas Court of Franklin County, Ohio overruling plaintiff's motion.

4. The order of October 17, 1935 of the Common Pleas Court of Franklin County, Ohio giving defendant leave to file his amended answer.

5. The order of November 8, 1935 of the Common Pleas Court of Franklin County, Ohio giving the defendant leave to file an amendment to his amended answer.

6. Objections by defendant to Bill of Exceptions filed in the Common Pleas Court of Franklin County, Ohio December 24, 1936.

7. From defendant's Exhibit 1 at page 133 the following should be included:

[fol. 251] Testimony by Edward H. Titus

Q. Let me read it to you. "But you want to bear in mind"—I think I did not read enough for you to understand the context—"I do not see how we can help it, but you want to bear in mind that through this trial our interests are single. You understand what I mean." What did you mean?

A. I mean that in this particular trial, I am the only one interested in it.

Q. And that you are going to swear to that and he is going to swear to that, that is what you meant?

A. I don't know what he is going to swear to, but I am going to swear to it because it is a fact.

The above testimony may be a duplication of paragraph numbered 45 of Petitioner's Motion to Print Abbreviated

Record. For the reason that the record is not available to us without a trip to Washington, we are unable to determine with certainty whether or not this is a duplication.

8. From Defendant's Exhibit number 3 page 163, the following should be included:

Testimony of E. H. Titus

Q. As a matter of fact, do you remember making an assignment of the claim in this suit here to your brother within thirty days after the making of this agreement of November 23rd, 1925?

Mr. Sheridan: This is clearly a collateral matter. A lot of objection could have been made to the other question, but I object to this.

The Court: I will allow it.

Mr. Sheridan: Exception.

Q. Did you make an assignment to your brother of whatever recovery you might make in this cause of action you are testifying about, within a short time after the agreement of November 23rd, 1925?

Mr. Sheridan: Same objection.

The Court: Objection overruled.

Mr. Sheridan: Exception.

A. I don't quite remember, but I did have an agreement with my brother, and it has always been a matter between us.

Q. And after your brother got through receiving certain expenses under that assignment, your wife was to get the balance?

A. No.

Q. There was an assignment to your brother?

A. Yes.

Q. There came a time when London Wallick learned about that assignment, do you remember that?

A. I told him about that assignment and the interest to my wife.

[fol. 252] This testimony may be a duplication of paragraph numbered 54 of Petitioner's Motion to Print Abbreviated Record.

9. A memorandum of agreement between London I. Wallick and Edward H. Titus shown on page 626 of defendant's

Exhibit number 3. This may be a duplication of paragraph numbered 50 of petitioner's said motion.

10. The following portion of the order of Justice Valente granting a new trial in the New York Supreme Court which portion appears at page 761 defendant's Exhibit 3:

"* * * and it appearing to my satisfaction that the trial of this action was closely contested, and that before the trial the plaintiff Edward H. Titus and London Wallick, one of said plaintiff's witnesses, had entered into an arrangement and agreement whereby London Wallick was to share in the proceeds of this litigation, and that this agreement was material and went to the very heart of the case, and that the plaintiff suppressed his arrangement with London Wallick and himself and that such suppression was a fraud upon the Court and the defendant herein, and it further appearing to my satisfaction that the defendant had no knowledge of the aforementioned arrangement and agreement between the plaintiff and London Wallick, either before or at the trial, that the plaintiff could not, in the exercise of diligence, have discovered the said newly discovered evidence before the trial, and that the defendant within a reasonable time after discovery thereof, made this application for a new trial, and it further appearing to my satisfaction that said new evidence would probably change the result of the determination of the Appellate Division, First Department, and that the interests of justice required the granting of the defendant's application for a new trial, and upon the filed memorandum of this Court,

It is, on motion of Olvany, Eisner & Donnelly, Esqs., attorneys for the defendant,

Ordered, that the said application for a new trial be and the same hereby is granted."

This may be a duplication of paragraph numbered 52 of petitioner's said motion.

11. The opinion of the Appellate Division of the Supreme Court of New York appearing at page 790 of Defendant's Exhibit 3.

12. The opinion and order of the Appellate Division of the Supreme Court of New York affirming Justice Valente in vacating the judgment and granting a new trial on the ground plaintiff had perpetrated a fraud on the court and on the defendant. We do not have the record before us

but we believe that the above matter will be found in defendant's Exhibit 3 some place after page 764.

13. That portion of Referee Jeremiah T. Mahoney's re-
[fol. 253] port setting up the computations on which the judgment sued upon is based, which portion is: (probably be found in defendant's Exhibit 5 near the order at page 881)

"Upon full and careful consideration of all the evidence, oral and documentary, and exhibits, contained in the stipulated record taken before the former Referee, I find that the defendant should be charged with the following:

With the net earnings of the Secor Hotel Company for the years 1908 to 1931, inclusive, as set forth in the account rendered by the defendant, in the amount of	$596,588.63
With the cancellation of the amortization of the leasehold owned by the Secor Hotel Company, formerly deduced from the net income of said corporation, in the amount of	300,000.00
With the sums withdrawn by the defendant during the years 1928 to 1931, inclusive, and charged against the net income of said Secor Hotel Company as salaries, aggregating	75,000.00
With payments made by said Secor Hotel Company to Louis Duane Wallick during the years 1923 to 1927, inclusive, and charged against the net income of said corporation amounting to	24,166.67
With 50% of the Federal income tax assessment charged against the net income of said Secor Hotel Company in 1927, which should be borne by the Hotel Deshler owned by the defendant, in the amount of	19,034.54
With 50% of the premium on the bond given with regard to said Federal income tax assessment which was charged against the net income of said Secor Hotel Company and which should be borne by the Hotel Deshler owned by the defendant, in the amount of	933.94
With the personal expenses of the defendant for the year 1927	8,002.79
Total charges to the Defendant	$1,023,726.57

Said charges to the defendant to be reduced by profits alleged to have been made by the hotel for the period 1928 to 1931, during which period no operations were carried on by the hotel in the amount of	23,667.45
	$1,000,059.12
Leaving a Balance Chargeable to the Defendant, before Computation of Interest of	$1,000,059.12
The defendant is further chargeable with interest to June 30, 1928, in the amount of	320,541.76
And with interest from July 1, 1928, to December 31, 1932, in the amount of	156,014.45
And with further interest from January 1, 1933, to December 31st, 1933, in the amount of	34,669.88
Making a Total Sum Chargeable to the defendant of	$1,511,285.21
Plaintiff's One-quarter Interest in said Sum Chargeable to the Defendant Amounts to	$377,821.30

[fol. 254] The defendant should be compelled to account to the plaintiff for the said sum of $377,821.30, in accordance with the computations above made."

14. Opinion of Supreme Court of New York approving Referee Mahoney's findings which appears at page 381 defendant's Exhibit 5.

15. So much of the report of February 24, 1933 of Referee Edmund McCarthy's report as to show he found no sum due from the defendant to the plaintiff. This report will probably be found in defendant's Exhibit 2.

The matters requested above in paragraphs numbered 1, 2, and 3 will show how first the suppressed assignment and agreement, defendant's Exhibit 8 and plaintiff's Exhibit D, came to the notice of the respondent.

The balance of the matters designated in the foregoing motion were referred to, discussed and considered in the trial court and in the Court of Appeals and have a direct bearing on the issues involved.

Counsel earnestly submits that all of the above designated portions of the record be included in the above record to be printed. If these portions are not included, it is believed that the respondent will be greatly prejudiced thereby in presenting his case to this honorable court.

Respectfully submitted, Rolland M. Edmonds, Attorney for Respondent. Rolland M. Edmonds, J. E. Butler, and W. M. Summer, of Counsel.

[fol. 255] [File endorsement omitted.]

[fol. 256] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1938

The petition herein for a writ of certiorari to the Supreme Court of the State of Ohio is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 42,673. Ohio Supreme Court. Term No. 188. Edward H. Titus, petitioner, vs. Lou C. Wallick. Petition for a writ of certiorari and exhibit thereto. Filed July 8, 1938. Term No. 188, O. T. 1938.

FILE COPY

Office - Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 188

EDWARD H. TITUS,

Petitioner,

vs.

LOU C. WALLICK.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND BRIEF IN SUPPORT THEREOF.

THOMAS I. SHERIDAN,
AARON FRANK,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 188

EDWARD H. TITUS,

Petitioner,

vs.

LOU C. WALLICK.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

To the Supreme Court of the United States and the Honorable Justices thereof:

The petition of Edward H. Titus, praying for a writ of certiorari on the ground that the courts of Ohio have denied full faith and credit to a final judgment rendered in the Supreme Court of the State of New York, and in support thereof, respectfully shows to this Honorable Court:

There is presently pending in this case a motion by petitioner to print an abbreviated record and by reason thereof references herein refer to the typewritten record and the exhibits annexed thereto.

A.

Summary Statement of the Matter Involved.

On May 1st, 1934, petitioner recovered a judgment in the Supreme Court of the State of New York against the respondent in the sum of $389,103.21 (R. 27-30). Thereafter petitioner instituted an action in the Common Pleas Court, Franklin County, Ohio (hereinafter referred to as the Common Pleas Court) for the purpose of making the judgment in the Supreme Court of the State of New York a judgment in the State of Ohio (R. 8).

Petitioner's action in the State of New York was instituted on December 22, 1925 (R. 147, folio 2) and was bitterly contested by respondent. Said action was tried twice in the Supreme Court of the State of New York (R. 144, page 41 of Case on Appeal; R. 146, page 52) and it was submitted upon five occasions to the Appellate Division of the Supreme Court of the State of New York, First Department (R. 144, page 53; 227 N. Y. App. Div. 789; R. 146, page 784; R. 147, page 42; R. 129), and once to the Court of Appeals before final judgment was obtained by petitioner (R. 133-135). In addition, three references were had (R. 144, folio 22; R. 145, pages 2-5; R. 30). The Ohio courts have predicated refusal to recognize the New York judgment on the ground of fraud (R. 176; 229, 233, 234) although the leading case of *United States* v. *Throckmorton*, decided by this Honorable Court in 1878, indicates that *extrinsic fraud*—possibly a method of attacking a judgment—*cannot be found where an adversary trial is had and the merits of a cause are disposed of.*

The action in the State of New York was instituted by petitioner, by reason of a fraud perpetrated by respondent, to impress a trust on 250 shares of the Secor Hotel Company, an Ohio corporation, representing a one-quarter in-

terest therein (R. 12, 15-18). Petitioner's complaint set forth the fraudulent conduct of respondent in connection with said stock and the resultant injury to petitioner (R. 14-17). In deciding that petitioner was entitled to the return of the stock the Appellate Division of the Supreme Court of the State of New York stated that petitioner's version was amply supported by the documentary evidence in the case (222 N. Y. App. Div. 17); and when said Appellate Division of the Supreme Court of the State of New York again recognized petitioner's ownership of said stock, after a new trial had been granted on the ground of newly discovered evidence, that court stated that the additional testimony was not of sufficient weight to cause the court to change the determination, in favor of petitioner, reached on the original appeal and for the second time rendered judgment for petitioner (235 N. Y. App. Div. 662). This judgment was affirmed by the Court of Appeals of the State of New York on July 19th, 1932 (260 N. Y. 519) and thereafter a reference was had which resulted in the award to petitioner in the sum of $389,103.21 (R. 27-30; 130, 131).

At the time of the institution of the action by petitioner, as plaintiff, in the Common Pleas Court, and at the present time, the judgment in the State of New York in favor of the petitioner and against respondent was and is a final judgment in said State of New York (R. 90, 103). The jurisdiction of the Supreme Court of the State of New York has been conceded by respondent and *no attempt has been made by him to impeach or set aside said judgment on any ground in the State of New York* (R. 95, 102, 167).

The petition filed by petitioner in the Common Pleas Court, on August 20th, 1934, alleged the recovery of the aforesaid judgment and attached to said petition was a transcript of the judgment recovered in the State of New York, authenticated as required by the Act of Congress (R. 10, 27-31).

Respondent's amended answer thereto averred three defenses: (1) that the judgment sued upon was not responsive to the issues made by the pleadings; (2) that petitioner was not the real party in interest; and (3) that the judgment in the State of New York was procured by fraud practiced upon the Supreme Court of that State and upon the respondent, in that petitioner was not the real party in interest and suppressed and withheld this fact from the Supreme Court of the State of New York (R. 69, 70). By further amendment respondent's answer set up Section 210 of the Civil Practice Act of the State of New York, requiring, with certain exceptions, that every action must be prosecuted in the name of the real party in interest (R. 73).

Petitioner and respondent waived a trial by jury in the Common Pleas Court (R. 89). The evidence in the case was largely documentary and petitioner relied wholly upon the judgment recovered by him in the Supreme Court of the State of New York, duly objecting and taking exception to the introduction of any evidence by respondent in derogation of said judgment (R. 99, 103-105, 106, 107). The trial court found against the respondent on the first defense (R. 166) but in favor of respondent on the second and third defenses, thereupon entering judgment for the respondent on December 3, 1936 (R. 167, 176, 193, 194). The judgment of the Common Pleas Court was affirmed by the Court of Appeals, Franklin County, Ohio (hereinafter referred to as the Court of Appeals) and judgment was entered, with respect thereto, on the 14th day of February, 1938 (R. 235). Petitioner then appealed to the Supreme Court of Ohio (R. 238, 241) under Article IV, Section 2 of the Constitution of Ohio, which gives that court jurisdiction as a matter of right in cases, among other things, involving questions arising under the Constitution of the United States; and petitioner further moved said Supreme Court of Ohio for an order directing the Court of Appeals to certify to the Su-

preme Court of Ohio its record for review (R. 245, 246). Said appeal as of right was based upon the decisions of this Honorable Court that where a claim is made upon or under a judgment of a sister state, it is a question arising under the Constitution of the United States. On April 27th, 1938, the Supreme Court of Ohio dismissed petitioner's appeal as of right and granted respondent's motion to dismiss the appeal as of right, so ordering and adjudging *on the ground that no debatable constitutional question was involved* (R. 240). The Supreme Court of Ohio likewise denied petitioner's motion for an order directing the Court of Appeals to certify to the Supreme Court of Ohio its record for review (R. 240). Five of the seven Judges sitting in the Supreme Court of Ohio rendered the aforementioned decision without opinion (reported in XI Ohio Bar 612).

A brief summary of the facts leading up to the rendition of the judgment in the Supreme Court of the State of New York and the subsequent judgment in the Common Pleas Court, gives full expression to petitioner's claim that the Court of Appeals failed to give full faith and credit to the judgment of the Supreme Court of the State of New York, to the end that the Court of Appeals and the Common Pleas Court denied to petitioner rights, privileges and immunities properly claimable under the Constitution and the Statutes of the United States.

Prior to 1924 petitioner had a substantial claim against respondent based upon respondent's fraud in connection with petitioner's 250 shares of stock of the Secor Hotel Company of Toledo, Ohio, which had been withheld from him by respondent for many years (R. 12-17). On or about March 31, 1924, petitioner assigned said claim to his brother, Walter Titus, under an oral understanding with regard to the use of any funds which might be derived therefrom in part to pay off and discharge certain indebtedness of petitioner and in part for the benefit of petitioner's wife (R.

165; 137-139). Said assignment was in writing and absolute upon its face.

On or about December 1, 1925, in order to define more effectively the rights of the various interested parties in said claim and in order that suit might be brought thereon, Walter Titus, by an instrument in writing (R. 137-139; 140-142; Petitioner's Exhibits D, E), reassigned said claim to petitioner. This instrument, after referring to the prior assignment and the oral understanding pursuant to which it was made, assigned said claim to petitioner by appropriate words and appointed petitioner as attorney-in-fact to effectuate collection of the claim. This instrument then provided that any money or other property collected upon said claim should be turned over to Walter Titus to be held and used by him, first, toward the payment of the expenses incurred in the collection of the claim, second, to the payment of one-half thereof to the wife of petitioner, third, to the payment or discharge of certain indebtedness of petitioner, and forth, the balance remaining, if any, to be paid to petitioner. Shortly after said reassignment, suit was instituted by petitioner on this claim in the Supreme Court of the State of New York, and said suit resulted in the judgment hereinbefore referred to (R. 147, folio 2).

After petitioner recovered judgment in the Supreme Court of the State of New York, one London I. Wallick, the brother of respondent, made claim against petitioner for a share in the proceeds, if any, to be realized from said judgment (Respondent's Exhibit 7; R. 151-163). Said London I. Wallick claimed that an agreement to that effect was made with petitioner on or about November 23, 1925 (R. 157; 144, Folios 104, 105). Petitioner and London I. Wallick were in sharp conflict over whether any such agreement had been made and as to the validity and effect of any writing as evidence of such agreement. Approximately

nine years after the institution of suit in the State of New York by petitioner against respondent, said London I. Wallick filed suit against petitioner in the Supreme Court of the State of New York, in which he asked for an injunction *pendente lite*, restraining petitioner from disposing of any of the moneys received or collected upon said judgment recovered by petitioner against respondent. Petitioner defended said suit and submitted therein an affidavit, dated August 17th, 1934, in opposition to the prayer for said injunction. Said affidavit set out at considerable length the history of the transactions between petitioner and respondent and London I. Wallick, relative to the subject matter of the action upon which judgment had been entered for petitioner and, among other things, petitioner's affidavit (R. 156, 157, 162, 163; Respondent's Exhibit 7) set forth the following: "I told him (London I. Wallick) at that time (November 23, 1925) that I had already assigned any interest in the proceeds of said action against Lou C. Wallick to Walter L. Titus and Emilie F. Titus. • • • The plaintiff's application for an injunction *pendente lite* should be denied. Prior to my execution of the instrument of November 23, 1925 (between plaintiff and London I. Wallick), I assigned my interest in my claim against Lou C. Wallick to Walter L. Titus, my brother, and Emilie F. Titus. The plaintiff herein knew of this assignment before the instrument of November 23, 1925, was executed. It is respectfully submitted that it does not lie within the jurisdiction of this court to now enjoin what has already been accomplished." The words within parenthesis are petitioner's, submitted, presently, for explanatory purposes.

The Court of Appeals, adopting reasoning other than that adhered to by the Common Pleas Court (R. 223, 227), held that petitioner was not the real party in interest in the State of New York under the written reassignment of December 1, 1925, because that instrument constituted peti-

tioner an attorney-in-fact only (R. 225). Such holding is contrary to the decisions of the State of New York and to the general principles as enunciated by other courts as to what constitutes a person the real party in interest.

The Court of Appeals, having found by its interpretation of the reassignment of December 1, 1925, that the petitioner was not the real party in interest, then held that he had suppressed and concealed this fact from the New York court, as evidenced by the statements contained in the affidavit (R. 229, 233). While characterizing the statements as mere conclusions (R. 227, 228), referring to a status prior to the commencement of the New York action, that court nevertheless held that the petitioner in making such statements indicated that he knew at the time the action was filed in New York that he was not the real party in interest in the suit. In other words, the Court of Appeals, by virtue of statements made in a collateral proceeding some nine years later, held that the petitioner's state of mind at that time, as indicated by his statements, was such that by necessary implication his state of mind must have been the same nine years before when he filed the suit in New York, and therefore at that time knew that he had no right to file it.

In arriving at its conclusion to affirm the judgment in favor of the respondent granted by the Common Pleas Court, the Court of Appeals virtually disregarded the fact that in 1929 respondent moved in the Supreme Court of the State of New York for a new trial on the ground of newly discovered evidence and that respondent submitted therein an affidavit of one Gentsch, sworn to on March 9, 1929, in which certain matter is set forth with regard to an assignment by petitioner to Walter L. Titus and to petitioner's wife (R. 234; 144, pages 115-122). *Respondent possessed knowledge in March 1929 of a prior assignment made by petitioner, and respondent made inquiry with regard thereto on the second trial held in 1930* (R. 146, folios 489-491).

At that time petitioner testified, on cross-examination, with regard to the assignment. Petitioner testified that he did have an agreement with his brother, Walter Titus, and that it had always been a matter between them. Respondent's counsel proceeded to interrogate petitioner with regard thereto but did not press the point, in his cross-examination, to the extent of ascertaining the exact character of said assignment; and despite said evidence, putting the respondent on inquiry as to a prior assignment of petitioner's claim, respondent made no effort to amend his pleading for the purpose of setting forth a defense with respect thereto.

B.

Reasons Relied on for the Allowance of the Writ.

1. This Honorable Court expressed doubt in *Milwaukee County* v. *White Co.*, decided in 1935, as to whether fraud in the procurement of a judgment will serve as a bar to an action thereon. In any event it has never determined that a judgment may be collaterally attacked for the kind of fraud that was considered in this case. Such decisions as it has rendered, particularly *United States* v. *Throckmorton*, decided in 1878, indicate that a judgment is not impeachable for intrinsic fraud and that extrinsic fraud cannot be found where an adversary trial was had. A determination as to whether the defense of fraud in the procurement of a judgment is available collaterally to a judgment-debtor and further amplification of the meaning of extrinsic fraud are necessary to insure protection of the immunities, with respect to judgments, set forth in the Constitution and Statutes of the United States, since the courts of Ohio gave consideration to a defense purely technical in nature and ignored the adversary trial had in the State of New York.

2. The present status of the litigation between petitioner and respondent is such that an unimpeached judgment rendered in the State of New York because of a fraud perpetrated by respondent is, from the practical standpoint at least, uncollectible, while that same unimpeached New York judgment is disregarded in Ohio—the State in which respondent resides and in which his property interests are apparently centered—on the theory that the cause of action should have been prosecuted by petitioner's brother. If the present status is perpetuated by this Honorable Court's refusal to assume jurisdiction the aforementioned anomalous result would harden into grave injustice, because the statute of limitations would bar recovery in suit instituted by petitioner's brother. It would mean that while the courts of New York have decreed that respondent perpetrated a fraud *upon petitioner* and deprived him of $389,000—a fraud proved by documentary evidence—respondent may, nevertheless, continue "to enjoy his ill-gotten plunder".

3. If petitioner were not the real party in interest and if such fact had been concealed from the Supreme Court of the State of New York this would not render the judgment recovered by petitioner against respondent in the State of New York impeachable in that State and the same credit, validity and effect should have been given thereto in the courts of Ohio.

4. The judgment recovered in the Supreme Court of the State of New York by petitioner against respondent is conclusive upon whether petitioner was or is the real party in interest since that question was necessarily determined by the Supreme Court of the State of New York in rendering its judgment in favor of petitioner.

5. Under the instrument of reassignment from petitioner's brother, Walter Titus, to petitioner, dated Decem-

ber 1, 1925 (R. 137-139), petitioner was and is the real party in interest, possessing legal title to the cause of action against respondent at all relevant times and possessing, as well, a definite beneficial interest by reason of the fact that the proceeds of suit were to be applied in liquidation of petitioner's indebtedness, with part of the proceeds payable to petitioner directly. Petitioner possessed full power to discharge respondent on respondent's indebtedness as reflected in the cause of action. In so far as the instrument of reassignment appointed petitioner as attorney-in-fact for his brother, Walter Titus, said appointment was not in derogation of the legal title and entirely consistent therewith by reason of the fact that in non-statutory jurisdictions an assignee is compelled to maintain suit in the name of his assignor.

6. Whatever statements were contained in petitioner's affidavit of August 17, 1934 (R. 151-163), when considered and interpreted in the light of the entire affidavit and in the light of the circumstances under which it was given, do not warrant the interpretation that petitioner perpetrated a fraud upon the Supreme Court of the State of New York. Said affidavit was directed specifically to occurrences on and the status as of November 23, 1925 (R. 227, 228). London I. Wallick was not seeking to enjoin *petitioner's interest* in the judgment obtained against respondent, but was seeking to enjoin the disposition *of all* of the proceeds of the judgment (R. 152). In opposing the motion for the all-inclusive temporary injunction petitioner was entitled to every possible proper legal objection. London I. Wallick was not entitled to the temporary injunction because he knew of the prior assignment made by petitioner to his brother on March 31, 1924 (R. 144, pages 115-122; R. 156, 157) and said London I. Wallick was not entitled to more than the alleged contract itself contemplated, that

is, an interest subject to a known prior assignment. Specifically, whatever occurred after November 23, 1925, did not concern London I. Wallick and as far as the latter was concerned, petitioner was entitled to assert such facts as would reveal to the Supreme Court of the State of New York that London I. Wallick, based upon his alleged contract of November 23, 1925, was not entitled to the unusual remedy of an injunction. Said London I. Wallick could not enjoin what he knew and contemplated could not be enjoined as of November 23, 1925. His proper remedy, if any, was indicated to him in said affidavit interposed by petitioner, to wit, an action to set aside the assignment under the Debtor and Creditor Law of the State of New York. It remains, however, that in attempting to limit said London I. Wallick in his application for a temporary injunction no fraud was perpetrated upon the Supreme Court of the State of New York in the action commenced by petitioner against respondent, at which time petitioner was the possessor of the reassignment of December 1, 1925, which had been duly executed and delivered. The foregoing destroys any possibility of inferring extrinsic fraud.

7. The judgment of said Court of Appeals, Franklin County, Ohio, and the judgment of said Common Pleas Court, Franklin County, Ohio, and the findings and conclusions thereof, are, by reason of the foregoing, in violation of Article IV, Section 1 of the Constitution of the United States, each of said Courts having failed and refused to give to the judgment secured by the petitioner against respondent in the Supreme Court of the State of New York, the full faith and credit required to be given said judgment by said Article IV, Section 1 of the Constitution of the United States and the Statutes of Congress enacted pursuant thereto. Said findings, conclusions and judgments are contrary to the manifest weight of evidence; there is

no evidence in the record to support them and they are, further, contrary to law, and said courts thereby denied the title, right, privilege and immunities which your petitioner claims under the Constitution and the Statutes of Congress enacted pursuant thereto.

8. The Supreme Court of Ohio, in determining that it would not take jurisdiction of petitioner's appeal as a matter of right, on the ground that said appeal involved no debatable constitutional question, acted in derogation of petitioner's rights under Article IV, Section 2 of the Constitution of the State of Ohio, and further failed to protect and, in fact, denied the title, right, privilege and immunities which your petitioner claims under the Constitution of the United States and the Statutes of Congress enacted pursuant thereto and failed and refused to give full faith and credit to the judgment secured by the petitioner against respondent in the Supreme Court of the State of New York as required to be given said judgment by said Article IV, Section 1, of the Constitution of the United States and the Statutes of Congress enacted pursuant thereto.

Wherefore your petitioner respectfully prays that this petition for a writ of certiorari to the Supreme Court of Ohio to review the judgment of the Court of Appeals, Franklin County, Ohio, and the order or judgment of the Supreme Court of Ohio in this case be granted.

Edward H. Titus,
By Thomas I. Sheridan,
Aaron Frank,
His Attorneys.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 188

EDWARD H. TITUS,

Petitioner,

vs.

LOU C. WALLICK.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The written opinion, dated November 30, 1937, of the Court of Appeals, Franklin County, Ohio, is not reported but it is set forth at length in the record on pages 220 to 234. The written opinion dated April 21, 1936, rendered in the Common Pleas Court, Franklin County, Ohio, is not reported, but it is set forth at length in the record on pages 166 to 176. No written opinion was rendered by the Supreme Court of Ohio (XI Ohio Bar 612).

The written opinion dated December 2, 1927, of the Appellate Division of the Supreme Court of the State of

New York, First Department, after the first trial, and by virtue of which it was held that petitioner was entitled to recover from respondent 250 shares of stock of the Secor Hotel Company, is reported in 222 N. Y. App. Div. 17; and the written opinion rendered by said Appellate Division of the Supreme Court of the State of New York after a second trial, granted upon newly discovered evidence, pursuant to which that court's original determination was adhered to, is reported in 235 N. Y. App. Div. 662. The affirmance thereof by the Court of Appeals of the State of New York was rendered without written opinion and a report thereof appears in 260 N. Y. 519.

No written opinion was rendered by the Appellate Division of the Supreme Court of the State of New York when said court affirmed an order granting a second trial on the ground of newly discovered evidence; nor did said Court render written opinions when it vacated the second referee's report and appointed Honorable Jeremiah T. Mahoney as Referee and when it affirmed the judgment in favor of petitioner and against respondent in the sum of $389,103.21. Said decisions are reported in 227 N. Y. App. Div. 789; 240 N. Y. App. Div. 818; and 244 N. Y. App. Div. 789, respectively.

II.

Jurisdiction.

1. Jurisdiction of this Court is invoked under the Judicial Code, Section 237 (b), as amended by the Act of February 13, 1925, U. S. C. A. Title 28, Section 344 (b); Section 350, Title 28 of U. S. C. A., as amended; and Revised Statutes, Section 905, Title 28 of U. S. C. A. Section 687.

2. The date of the judgment to be reviewed, as determined by the order of the Supreme Court of Ohio, dated April 27, 1938, adjudging its dismissal of petitioner's appeal

to said Court on the ground that no debatable constitutional question is involved, is April 27, 1938 (R. 240).

3. The petition filed by petitioner in the Common Pleas Court, Franklin County, Ohio, on August 20th, 1934, was predicated entirely upon the judgment, properly authenticated, recovered by petitioner against respondent in the Supreme Court of the State of New York (R. 8; 10; 27-31). Respondent's answer thereto set forth affirmative defenses presumably predicated upon exceptions to the rule that full faith and credit shall be given by each State to the judgments of a sister State (R. 69, 70, 73). The pleadings in the cause drew into question, directly so, the full faith and credit clause of the United States Constitution. In establishing a *prima facie* case at the trial held in the Common Pleas Court, Franklin County, Ohio, petitioner relied entirely upon the properly authenticated judgment recovered in the Supreme Court of the State of New York and during the course of the trial petitioner duly objected and excepted to the admissibility of any and all evidence offered by respondent in derogation of said judgment (R. 99; 103-107). Petitioner placed full reliance upon the judgment recovered by him in the New York Court. In refusing to enforce the judgment in Ohio the Common Pleas Court, of necessity, gave consideration to the constitutional question because it subjected the New York judgment to collateral attack, and it invoked in its conclusions an exception to the full faith and credit clause when extrinsic fraud is established. In addition, the constitutional question was squarely presented to the trial court because a motion was filed by petitioner to respondent's answer, seeking to strike it from the files as frivolous on the ground that under the full faith and credit clause of the Constitution the judgment became final in the State of New York and the defenses raised by the answer were, therefore, unavailing (R. 45-47; 101). This motion was overruled (R. 52).

The Court of Appeals considered and passed upon the constitutional question, as is apparent from the language of its opinion (R. 230-232), where the Court discussed the authorities determining under what circumstances a judgment of a sister State may be assailed despite the immunities set forth under Article 4, Section 1 of the United States Constitution. The contention that the New York judgment could not be denied the protection of the full faith and credit clause of the Constitution in the Courts of Ohio was again presented to the Supreme Court of Ohio by the Assignments of Error (R. 242). Moreover, arguments of counsel and all briefs submitted set forth full discussion of the immunity claimed by petitioner by reason of Article 4, Section 1 of the United States Constitution (R. 222, 230, 231). After affirmance of the judgment of the Common Pleas Court, Franklin County, Ohio, and within eighteen days thereof and on or about the 4th day of March, 1938, petitioner duly appealed to the Supreme Court of Ohio as a matter of right, by reason of a debatable constitutional question (R. 238, 241) and petitioner also moved said Supreme Court of Ohio for an order directing the Court of Appeals, Franklin County, Ohio, to certify to the Supreme Court of Ohio its record for review (R. 245, 246). Petitioner's appeal as of right to the Supreme Court of Ohio was dismissed on the ground that no debatable constitutional question was involved and petitioner's motion for an order directing the Court of Appeals, Franklin County, Ohio, to certify its record for review was overruled on the 27th day of April, 1938 (R. 240). The aforementioned decisions and rulings of the Supreme Court of Ohio, as found particularly in its entry dismissing the appeal (R. 240), thereupon became the final judgment of the highest State court in which a judgment could be had. The decision of the Supreme Court of Ohio whereby it refused to assume jurisdiction of the appeal on

the ground that no debatable constitutional question was involved, constituted a decision of the case on the merits.

By reason of the failure of the Courts of Ohio to give full recognition to the judgment recovered by petitioner against respondent in the Supreme Court of the State of New York, the title, right, privilege and immunity of petitioner, claimed under the Constitution and Statutes of the United States, which title, right, privilege and immunity were claimed by petitioner at all relevant times during the proceedings in Ohio and were dealt with by the courts of Ohio, were denied by the Common Pleas Court, Franklin County, Ohio, the Court of Appeals, Franklin County, Ohio and the Supreme Court of Ohio. It is respectfully submitted that this Honorable Court has jurisdiction to review the judgment rendered in this cause in Ohio under the provisions of Section 344 of Title 28, United States Code.

4. The following cases sustain the jurisdiction of this Court to review the judgment of the Court of Appeals, Franklin County, Ohio and the order or judgment of the Supreme Court of Ohio:

Van Huffel v. *Harkelrode*, 284 U. S. 225;
Green v. *Van Buskirk*, 72 U. S. 307;
Crapo v. *Kelly*, 83 U. S. 610;
Crescent City Livestock Co. v. *Butchers' Union*, 120 U. S. 141;
Great Western Telegraph Co. v. *Purdy*, 162 U. S. 329;
Hancock National Bank v. *Farnum*, 176 U. S. 640.

III.

Statement of the Case.

A full statement of the case has been given under the heading in "A" in the petition and in the interests of brevity no repetition of the statement will be made at this point, except to set forth that the instrument of assignment,

dated March 31, 1924, and the instrument of reassignment, dated December 1, 1925, by virtue of which it is established that petitioner was and is the real party in interest constitute respondent's Exhibit 8 (R. 165) and petitioner's Exhibits D, E, respectively (R. 137-142). It may also be pointed out that the affidavit executed by petitioner on August 17, 1934, upon which respondent relied in order to bring about the denial of full faith and credit to the judgment recovered by petitioner against respondent in the Supreme Court of the State of New York, constitutes Respondent's Exhibit 7 (R. 151-164).

The relevant portions of the affidavit of Gentsch, sworn to on March 9, 1929, which affidavit contains matter with respect to an assignment by petitioner to his brother and to petitioner's wife, is set forth in Respondent's Exhibit I, folios 345 to 359 thereof inclusive (R. 144). The Gentsch affidavit was submitted by respondent when he made a motion in the Supreme Court of the State of New York for a new trial on the ground of newly discovered evidence, and it is this affidavit which serves to spell out knowledge on the part of respondent of such facts which would have enabled respondent to plead lack of capacity in the action instituted by petitioner against respondent in the State of New York.

The testimony given by petitioner, in cross-examination, at the second trial held in the Supreme Court of the State of New York, as a result of which respondent again acquired sufficient knowledge with respect to an assignment, enabling respondent, if he saw fit, to plead lack of capacity, is set forth in respondent's Exhibit 3, at folios 489 to 491 thereof inclusive (R. 146).

IV.

Specification of Errors.

The reasons relied on for the allowance of the writ, appearing in the petition (ante pages 9-13), with the excep-

tion of the second paragraph thereof, contain the Specification of Errors now urged and are here adopted.

ARGUMENT.

Summary of the Argument.

Point I. The prosecution of petitioner's cause of action against respondent in the courts of Ohio necessarily involved a constitutional question since he sought to obtain recognition in Ohio of a judgment recovered in New York. The disposition of the constitutional question by the courts of Ohio was directly in derogation of petitioner's constitutional rights and therefore petitioner properly seeks to invoke this Court's supervisory jurisdiction.

Point II. The controlling authorities in this Court indicate that parties to an action cannot, in a collateral proceeding, impeach a judgment for fraud in the obtaining thereof.

Point III. Petitioner's judgment remains unimpeached and unimpeachable in the State of New York and, therefore, it was not properly subject to collateral attack in the Ohio courts.

Point IV. Petitioner was the real party in interest in the suit commenced by him in the Supreme Court of the State of New York by virtue of his legal ownership of the claim against the respondent, as well as his beneficial interest therein.

Point V. The judgment recovered by petitioner in the State of New York is conclusive upon whether petitioner is the real party in interest.

Point VI. Petitioner was guilty of no fraud on the New York court and even if he was, it did not constitute ex-

trinsic fraud and it did not justify a denial of full faith and credit to the New York judgment.

Point I.

The Ohio courts refused, directly so, and contrary to constitutional provision, to give full faith and credit to the New York judgment.

It is clear that the specific question in this case is whether the New York judgment is within the protection of the full faith and credit clause of the Constitution. The Ohio trial court and the Court of Appeals denied it this protection; and when the Supreme Court of Ohio failed to see that nonrecognition of the New York judgment involved a debatable constitutional question it likewise struck at the constitutional inviolability of the judgment.

The Supreme Court of Ohio achieved this result despite its own decision in *Armstrong* v. *Armstrong*, 117 O. S. 556, where suit was instituted in Ohio on a Kentucky judgment for alimony payable in future installments. The court held that the question arose "under the provisions of the Federal Constitution, Article IV, Section 1" and granted a petition in error as of right.

This Court, in determining its own jurisdiction, has held, uniformly and repeatedly, that where suit is filed in one State on a judgment secured in a sister State, or where a defense in one State is based upon a judgment secured in a sister State, the question presented is one arising under the Constitution of the United States.

Green v. *Van Buskirk*, 72 U. S. 307; 74 U. S. 139, 145;
Crapo v. *Kelly*, 83 U. S. 610, 620, 621;
Crescent City Livestock Co. v. *Butchers' Union*, 120 U. S. 141, 146, 147;
Hancock National Bank v. *Farnum*, 176 U. S. 640;
Great Western Telegraph Co. v. *Purdy*, 162 U. S. 329;
Mutual Life Ins. Co. v. *McGrew*, 188 U. S. 291, 311.

The decisions state only what is apparent, that is, that the ing of the petition itself presents the constitutional ques-on, as it is only by virtue of the full faith and credit clause f the Federal Constitution that a court of one State is re-uired to enforce a judgment rendered in a sister State. refusing to enforce the judgment in Ohio the lower courts ust necessarily have considered the effect of the judgment nder those provisions of the Constitution. No other situa-on is possible. *The mere presentation of the judgment for nforcement raises the question.*

In addition, the constitutional question was kept in the reground by reason of respondent's affirmative defenses f lack of capacity to sue an extrinsic fraud, the latter ing peculiarly applicable to suits on judgments and, fur-er, by reason of respondent's specific amendment to the nswer that Section 210 of the New York Civil Practice Act arred recovery in Ohio on the New York judgment.

It is well-recognized that no particular words or phrases re necessary for the assertion of the claim of consti-tional rights and that it is sufficient if it appears from e record, either expressly *or by clear intendment*, that ch rights were brought to the attention of the State court ith fair precision and in due time.

Bryant v. *Zimmerman*, 278 U. S. 63;
St. Louis, I. Mt. & So. Ry. Co. v. *Starbird*, 243 U. S. 592, 599.

It may be stated, parenthetically, that this Court may roperly review the findings upon which the Ohio courts de-rmined that petitioner was not the real party in interest nd that he perpetrated a fraud upon the New York court ecause the findings are completely interwoven with the enial of full faith and credit to petitioner's judgment re-vered in the State of New York.

Fiske v. *Kansas*, 274 U. S. 380, 385;
Kansas City So. Ry. v. *Albers Comm. Co.*, 223 U. S. 573, 591.

Point II.

Fraud in obtaining a judgment furnishes no ground for collateral attack.

In *Freeman on Judgments* (5th Ed.), pages 633 and 663, the view is expressed that *parties to an action*, as distinguished from third parties, may not attack a judgment collaterally for fraud, except possibly such fraud which goes to the question of jurisdiction.

This Court has stated, clearly and unequivocally, that fraud in procuring a judgment cannot be set up, by way of collateral attack, to bar recovery thereon. The principle may be expressed by the statement that a judgment may be assailed for want of jurisdiction, but not otherwise.

Christmas v. *Russell*, 72 U. S. 290, 303-306; cited in
Fauntleroy v. *Lum*, 210 U. S. 230, 236, 237;
Hanley v. *Donoghue*, 116 U. S. 1, 4;
Simmons v. *Saul*, 138 U. S. 439, 458;
Thompson v. *Whitman*, 85 U. S. 457.

In cases such as *United States* v. *Throckmorton*, 98 U. S. 61; *Cole* v. *Cunningham*, 133 U. S. 107, 112, and *United States* v. *Atkins*, 260 U. S. 220, when this Court discussed the question as to whether extrinsic fraud will bar enforcement of a judgment, *a direct proceeding*, attacking the judgment, was under consideration; while in such cases as *Webster* v. *Reid*, 52 U. S. 437, and *McNitt* v. *Turner*, 83 U. S. 352 (referred to in *Milwaukee County* v. *White Co.*, 296 U. S. 268, 276, on the subject of extrinsic fraud), suit was brought not to enforce a judgment, but to recover land purchased either under an execution sale or a court decree. In the two latter cases vacation of a judgment was not an objective in the action; the judgment was brought collaterally before the court as evidence and it was held there-

ore that, similarly, consideration might possibly be given, ollaterally, to the subject of extrinsic fraud. It is sub- itted that the *Webster* and *McNitt* cases have no rel- vancy in a case such as the instant one, which involves uit on the judgment itself.

The fundamental distinction between collateral and direct ttack, on the basis of fraud, led the Supreme Court of innesota in *In re Melgaard's Will*, 200 Minn. 493, to state, discussing the *Throckmorton* case, that:

> "Only after it has been determined, by other and appropriate standards, to be direct attack, on the ground of fraud, can the distinction between that which is extrinsic and that which is intrinsic find the subject-matter for its operation. In order to be open to collateral attack a judgment must be void on the face of the record, as for want of jurisdiction."

In the light of the foregoing, the statement in *Milwaukee ounty* v. *White Co.*, 296 U. S. 268, 276, that recovery on a dgment may be resisted "possibly because procured by raud" is entirely clear and completely reconcilable with e earlier authorities. It is expressive of the recognized istinction between *direct* attack, which may be countenanced nd *collateral* attack, such as the instant case, which will not e countenanced.

Point III.

The judgment remains unimpeached and unimpeachable New York and it is therefore not subject to collateral ttack in Ohio.

The law is well-settled that a judgment of a State court, hich had jurisdiction, is entitled in the courts of other tates to the same credit, validity and effect which it has in e State in which it was rendered.

Roche v. *McDonald*, 275 U. S. 449, 451, 452.

At the outset it may be stated that the defendant bore the burden of establishing, by a fair preponderance of the evidence, that the judgment obtained by petitioner was impeachable in the State of New York by reason of extrinsic fraud. In other words, it was incumbent upon respondent to show that the courts in the State of New York would set aside a judgment if suit therefor had been maintained by one who was not the real party in interest. No authority whatsoever was furnished on this point by the respondent or by either of the lower courts in Ohio. Assumptions by a foreign court as to what the New York court should regard as extrinsic fraud are completely unwarranted. An Ohio court cannot assert that a New York court *should* consider itself as having been subjected to extrinsic fraud. To disregard petitioner's judgment it was absolutely necessary for respondent to establish that a New York court *would* consider itself as having been subjected to extrinsic fraud—and only adjudication on this point can be regarded as conclusive. In summary, it is for the New York court—and only the New York court—to state whether its judicial process has been outraged. That statement must be found in the litigated case or in cases of similar nature. Respondent failed completely in his efforts to meet this test.

The New York viewpoint with regard to the effectiveness of a judgment is well stated in *Phillips* v. *Griffin*, 236 N. Y. App. Div. 209, at p. 211:

> "The question involves consideration of the full faith and credit clause of the Federal Constitution. (Art. 4, Sec. 1.) A judgment of a sister state may be assailed for want of jurisdiction over either the person or the subject-matter but not otherwise. (*Andrews* v. *Andrews*, 188 U. S. 14; *Clarke* v. *Clarke*, 178 id. 186)."

See also:

Boston & Maine R. Co. v. *D. & H. Co.*, 268 N. Y. 382, 391.

The recent case of *Matter of Holden*, 271 N. Y. 212 is absotely conclusive upon the point that petitioner's judgment ould not be impeached in New York.

As in the *Holden* case no one may question the validity of e reassignment to petitioner except the assignor and, posbly, petitioner's wife and London I. Wallick who comenced suit in the State of New York against the petitioner, questing therein a temporary injunction. As in the *olden* case the respondent is obligated to make payment to e party who appears to be the legal owner of the claim and court is empowered to inquire into collateral matters hich have no effect whatsoever upon respondent's obligaon to account with respect to petitioner's 250 shares of ecor Hotel stock.

Quite in accord with the principles enunciated by this ourt, the New York authorities do not adhere to the view at a judgment may be subjected to collateral attack on e ground of extrinsic fraud. Such New York cases as *ayor* v. *Brady*, 115 N. Y. 599; *Ward* v. *Southfield*, 102 N. Y. 7; *Corley* v. *N. Y. & H. Rail. Co.*, 12 N. Y. App. Div. 409; d *Matter of Holden, supra*, which gave consideration to e question as to whether extrinsic fraud would bar enrcement of the judgment, involved a direct attack, by way motion for new trial or suit in equity, as distinguished om a collateral attack; and it is apparent, therefore, that e New York authorities adhere to the implied distinction t forth in *Milwaukee County* v. *White Co.*, 296 U. S. 268, 6. The case of *Gray* v. *Richmond*, 167 N. Y. 348, is of no gnificance because the litigants therein proceeded upon the eory that an Indiana judgment could be attacked colterally and the New York Court of Appeals relied upon the ncession.

Reference has been made to the New York authorities der Point IV herein to the effect that the courts in the ate of New York will disregard all facts with respect the purpose of an assignment and the disposition of pro-

ceeds of suit if the assignment is fair upon its face. Reference has also been made under Points VI and V herein, respectively, to the view adhered to by the New York courts that an adversary trial will bar attack on a judgment and that technical defenses, such as lack of capacity, will be disregarded.

Point IV.

Petitioner was the real party in interest in the New York suit.

The trial court in Ohio and the Court of Appeals, prerequisite to their ultimate finding that the New York judgment was obtained by fraud, held that petitioner was not the real party in interest in the New York suit and had no right to bring the suit in his own name. The Court of Appeals did not, however, concur in the reasoning by which the trial court reached this result (R. 223, 227).

The trial court disregarded, erroneously so, the reassignment of the claim to petitioner on December 1, 1925 and held that petitioner was bound by isolated statements contained in his affidavit of August 17, 1934 (R. 172-176). The Court of Appeals took the proper view, that the affidavit referred to petitioner's status as of November 23, 1925, when legal title to the claim was in petitioner's brother and that whether petitioner was the real party in interest depended upon the legal effect of the reassignment of December 1, 1925 (R. 223, 227, 228). The Court of Appeals then proceeded to find as a matter of law—and in doing so it was completely in error—that the reassignment was a mere naked power of attorney (R. 225). It predicated its decision upon (1) the second paragraph of the reassignment which appointed the assignee (petitioner) as attorney-in-fact for the assignor (petitioner's brother) (R. 224-225) and (2) upon the fact that petitioner had only a contingent right to share in the proceeds of suit after certain payments (R. 225). The opinion concedes, however, that

"it is true the payments in these subheadings were to be made to liquidate the indebtedness" of petitioner (R. 225).

It is apparent, and the Court of Appeals so found, that if the instrument of December 1, 1925 (R. 137), constituted the petitioner the real party in interest in the New York suit, then the petitioner should have prevailed in the Ohio action. This fact would instantly remove any possibility of fraud upon the New York court as the only fraud alleged is the concealment from the New York court at the time the suit was instituted that the petitioner was not the real party in interest. *The Court of Appeals also conceded that the execution and delivery of the instrument of December 1, 1925, were undisputed* (R. 227).

The reassignment of December 1, 1925, sets forth an unqualified assignment (Petitioner's Exhibits D, E), appoints petitioner as attorney-in-fact for the assignor and provides for the distribution of the proceeds as follows: (1) payment of expenses; (2) one-half of the balance to petitioner's wife; (3) payment of petitioner's debts; and (4) payment of the balance to petitioner.

The effect and validity of the reassignment must be determined in accordance with the law of the place where the reassignment was made, that is, in accordance with the law of the State of New York.

Williston on Contracts, Revised Edition, page 1296;
Barbin v. *Moore*, 85 N. H., 362.

In *Carmody's New York Practice*, the standard work on procedure in that State, Vol. 2, pages 804 to 808, appears the following in reference to the "real party in interest" statute when the question of an assignment is involved:

> "The consideration paid, the purpose of the assignment, the use to be made of any proceeds collected, is immaterial. The plaintiff must have some title, legal or equitable, to the thing assigned. But if the assignee have such title, it is enough. So it is of no moment

that no consideration was paid for the demand by the assignee, or that others have a claim on the assignee for a portion or for all the proceeds, or that the assignment was made merely for the purpose of bringing an action. The defendant has no legal interest to inquire as to this, for a payment to or recovery by the assignee in such case is a protection to the defendant against any claim that can be made by the assignor. Thus where a judgment recovered by a bank, was, for the bank's convenience, assigned to the cashier by an instrument absolute upon its face, the cashier is the proper party to bring an action upon the judgment as ant in such case is that the legal title to the judgment is the real party in interest. All that affects the defend- in the plaintiff, so that a payment to, or satisfaction by him would be a full and complete satisfaction as to all others who theretofore had or might thereafter claim an interest in it." (pp. 806, 807.)

The cases supporting the same principles are:

Sheridan v. *The Mayor*, 68 N. Y. 30;
Schwartz v. *Fletcher*, 238 N. Y. App. Div. 554, 557;
Donlin v. *Carlow*, 120 N. Y. Misc. Rep. 698;
Horne v. *McGinley*, 252 N. Y. App. Div. 296;
Tioga v. *Tidd*, 164 N. Y. Misc. Rep. 273, 286;
Spencer v. *Standard Corp.*, 237 N. Y. 479;
McCauley v. *Georgia R. R. Bank*, 239 N. Y. 514;
Meyers v. *Credit Lyonnais*, 259 N. Y. 399;
Hunter v. *Allen*, 106 N. Y. App. Div. 557;
Allen v. *Brown*, 44 N. Y. 228;
Meeker v. *Claghorn*, 44 N. Y. 349;
Brown v. *Powers*, 53 N. Y. App. Div. 251;
Birdall v. *Read*, 188 N. Y. App. Div. 46;
Hentschel v. *Fidelity, etc.*, 87 F. (2d) 833, 838;
Lentz v. *Oregon*, 116 Oreg. 683;
Seybold v. *Grand Forks*, 5 N. D. 460;
Los Robles Water Co. v. *Stoneman*, 146 Cal. 203;
Elmquist v. *Markoe*, 45 Minn. 305.

The authorities enumerated state not only the New York but the general law as to who is a "real party in interest" under modern code provisions. With these authorities in mind it is difficult to follow the reasoning of the Court of Appeals that the reassignment of December 1, 1925, was simply a naked power of attorney and did not constitute the petitioner the real party in interest in the New York suit.

It may be noted, parenthetically, that Section 210 of the Civil Practice Act (New York), pleaded by respondent in his amended answer (R. 73) provides that: "Every action must be prosecuted in the name of the real party in interest, except that • • • a trustee of an express trust • • • may sue without joining with him the person for whose benefit the action is prosecuted." The very least that can be said of the reassignment is that petitioner was, by virtue thereof, the trustee of an express trust. *Hoffman* v. *Foote*, 172 N. Y. 348, 355, expresses the general principle that it is unnecessary to use any particular formula of words in order to create a trust and that principle was given full application in *Banca C. I. Trust Co.* v. *Clarkson*, 274 N. Y. 69, 74. In the latter case the loss suffered by plaintiff was made good by a surety company. It was agreed between plaintiff and the surety company that plaintiff would bring suit in its own name, but for the benefit of the surety company, to recoup the losses, the recovery, however, to be paid to the surety company. Based upon this simple arrangement, devoid of formality, the Court of Appeals held that plaintiff was a trustee of an express trust and that it was, therefore, entitled to bring suit in its own name. *Banca C. I. Trust Co.* v. *Clarkson*, *supra*, is, in and of itself, complete answer to the contention that petitioner was not the real party in interest.

It is well settled, moreover, that an assignor, assigning claim as security for a debt, still retains sufficient interest

in the claim to constitute the assignor the real party in interest. Petitioner had, therefore, a sufficient interest, under the March 31, 1924, assignment alone, to have brought suit in his own name.

Carmody's New York Practice, Vol. 2, p. 808;
Bachman v. *Hausman,* 241 N. Y. App. Div. 153.

In construing the reassignment, reference may be had to the recitals which show the true intent to make an assignment and not, merely, to appoint an attorney.

The words "sell, assign, transfer and set over" alone effectuate an assignment.

Kalb v. *Leff,* 138 N. Y. Misc. Rep. 830.

In stressing the second paragraph of the reassignment, where petitioner was appointed as the assignor's attorney, the Court of Appeals overlooked the fact that the paragraph is nothing more than a survival of the early law upon the subject of assignments and that it is just a precaution adopted for use in such jurisdictions as still adhere to the common law theory that an assignee must bring suit in the name of his assignor.

Williston on Contracts, Revised Edition, pages 1166-1170, 1294;
People v. *Ladew,* 237 N. Y. 413, at pages 436, 438;
Allen v. *Brown,* 44 N. Y. 228;
Casady v. *Scott,* 40 Idaho 137.

The reassignment provides that petitioner, if he collects anything, shall turn the proceeds back to petitioner's brother, but petitioner's brother must use the proceeds in discharging certain indebtedness of the petitioner to petitioner's brother and others, paying one-half thereof to petitioner's wife and the balance to petitioner. These provisions were held wholly inconsistent with an assignment such

as would constitute petitioner the real party in interest for the reason that his interest by virtue thereof was only contingent (R. 225) and not real, that is to say, he was simply an attorney in fact. This holding is clearly wrong, because what is to be done with the proceeds is no concern of the debtor.

Allen v. *Brown*, 44 N. Y. 228;
Meeker v. *Claghorn*, 44 N. Y. 349;
Wolcott v. *Hillman*, 23 N. Y. Misc. Rep. 459.

In reaching the conclusion that the petitioner was not the real party in interest under the reassignment, the Court of Appeals disregarded entirely the purpose in turning the proceeds of the collection, if any, over to petitioner's brother. The dominant purpose was to pay petitioner's debts to petitioner's brother and others, and to pay petitioner's wife; the balance, if any, to be paid to the petitioner. Petitioner's brother had no interest in the claim other than as security for the payment of the petitioner's debt to him—the balance belonged to the petitioner and his wife. As part of petitioner's brother's security, he was to handle the funds if the petitioner collected any, a provision clearly incidental to the primary purpose of the instrument. Had petitioner no interest other than payment of his obligations to his brother, they were, after all, his own obligations, which fact alone would give him a real substantial, beneficial interest. On this point *Brown* v. *Gimn*, 66 O. S. 16, referred to by the Court of Appeals, is inapplicable; and, moreover, that case involved a champertous transaction.

Stricks v. *Siegel*, 135 N. Y. Misc. Rep. 608, affirmed as modified 138 N. Y. Misc. Rep. 266.

The Court of Appeals hopelessly confused the question of title to the claim with the question of the disposition of

the proceeds. The distinction was clearly pointed out in *Warshauer* v. *Webb*, 9 N. Y. St. Rep. 529, in that the right of one entitled to a part or all of the proceeds can only attach after the claim has been collected and not before. The very fact that the reassignment requires the petitioner to "endorse, transfer and deliver" the proceeds to petitioner's brother connotes title thereto in the petitioner. As between the assignee and the debtor, the only concern of the debtor is whether payment to the assignee is a complete satisfaction and extinguishment of the claim.

The Court of Appeals relied upon *Spencer* v. *Standard Chemicals Co.*, 237 N. Y. 479, 143 N. E. 651 as supporting its conclusion and quoted from the headnote found in the Northeastern Reporter (R. 226), which is inaccurate because, while the opinion itself says that a plaintiff must have "some title, legal or equitable, to the thing assigned", the headnote omits the significant word "some".

In summary, until the respondent is discharged—and he cannot have any concern in what occurs thereafter—petitioner has legal title under paragraph 1 of the reassignment. By reason of the common law he is given protective powers under paragraph 2—powers not in derogation of the legal title and quite consistent with the assignment itself. And under paragraph 3 he has legal title to both the claim and the proceeds at all relevant times (in so far as respondent is concerned).

Point V.

The New York judgment is conclusive upon whether petitioner is real party in interest.

Whether petitioner was the real party in interest is now immaterial as the judgment of the New York court is conclusive upon that issue and the question could not be raised in the Ohio action. Lack of capacity to sue is not an objection that goes to the jurisdiction of the court.

McCandless v. *Furland*, 293 U. S. 67, 75.

By paragraph II of his second amended complaint in the New York action (R. 12), petitioner asserted he was the plaintiff in the action and "now is and since in or about the month of October, 1906, has been the owner of a one-quarter interest" in the Secor Hotel Company, represented by 250 shares of the common stock of that company. The ownership of the stock and the alleged interest of petitioner in the company were the basis of petitioner's claim. Said complaint then proceeds to set forth the fraudulent conduct of respondent in connection with the stock and the resultant injury to petitioner. By his second amended answer (R. 20) respondent specifically denied the allegations of Paragraph II of said amended complaint, thus putting squarely in issue the petitioner's ownership of the stock and the claim sued upon. The New York judgment is conclusive, not only as to matters thereby actually determined, but also as to every other matter which might have been litigated and decided upon the issues made in the case, and upon which it was tried. This doctrine is peculiarly applicable to defenses not going to the merits of the controversy, such as real party in interest, capacity to sue, etc., and a judgment cannot be impeached collaterally by the assertion of such defenses after judgment.

23 Cyc. 964;
34 *C. J.* Sec. 859;
Freeman on Judgments, 5th Ed., pages 753-756;
Roby v. *Rainsberger*, 27 O. S., 674;
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Phillips v. *Griffin*, 236 N. Y. App. Div. 209;
U. S. v. *California & Oregon Land Co.*, 192 U. S. 355.

It matters not that the plaintiff may have falsely represented or withheld from the defendant his lack of capacity to sue or the fact that he was not the real party in interest.

Toole v. *Fite*, 57 Utah 1, 168 Pac. 427.

Whether the respondent knew of the defenses which he failed to assert in the original action is immaterial.

Couldwell v. *City of New York*, 252 N. Y. App. Div. 559, 562; affirmed 278 N. Y. —, 15 N. E. (2nd) 70.

Still another principle foreshadows the respondent's right to set up in the Ohio suit the defense of the real party in interest, and that is the principle that a party cannot set up after judgment facts constituting a defense of which he was ignorant but which, had he been diligent, he could have discovered.

Toledo Co. v. *Computing Co.*, 261 U. S. 399, 421;
Mayor, etc. v. *Brady*, 115 N. Y. 599;
Harrington v. *Denny*, 3 Fed. Supp. 584, 593, appeal dismissed 68 Fed. (2) 1004;
Moffett v. *Robbins*, 81 F. (2d) 431.

Surprising as it may seem, there is no discussion by the Court of Appeals of this elementary principle of *res judicata* and its application to the instant case (R. 234).

Point VI.

The absence of extrinsic fraud.

The Court of Appeals, having determined that the petitioner was not the real party in interest under the reassignment of December 1, 1925, then proceeded to determine whether he suppressed and concealed that fact from the New York court and if he did, whether he committed such a fraud on the New York court as would deny to the New York judgment full faith and credit in Ohio. The court found the solution of the question "difficult" (R. 229).

In reaching its conclusion that petitioner has concealed and suppressed from the New York court the fact that he was not the real party in interest, the court had recourse to the affidavit filed by the petitioner in the London Wallick

ction some nine years after the beginning of the original ction. The circumstances surrounding the affidavit are lly set forth in the petition (*ante*, pages 6, 7, 11 and 12). Although the Court of Appeals had previously in its opinon characterized parts of the affidavit as simply conclusions nd of no effect whatever in determining petitioner's actual tatus before the New York court in the original action (R. 23, 227, 228), nevertheless, it held that these "conclusions" ade nine years later were evidence establishing that when he petitioner filed his original action he knew that he was ot the real party in interest under the reassignment of December 1, 1925. This line of reasoning cannot be followed. The fact remains, and it is undisputed, that when petiioner originally filed his suit in New York he had the reassignment of December 1, 1925, duly executed and delivered, in his possession (R. 119, 143, 227). Even if that nstrument did not constitute the petitioner the real party n interest as a matter of law, it was such an instrument as ould justify any layman in thinking that it did give him uthority to institute the suit; and, therefore, failure to isclose any supposed information in the instrument would learly not be fraudulent. To hold that because of statements mad[illegible] petitioner nine years later, in a collateral roceeding, he therefore had interpreted an instrument to is disadvantage nine years before and concealed this inerpretation from the court, is extending the probative value f such evidence beyond sound legal principles. The statements contained in the affidavit, when considered and interpreted in the light of the entire affidavit and in the light f the circumstances under which it was given, do not warant any such extension of its probative value (*ante*, pages 7, 11 and 12).

There is a legal principle of universal recognition and acceptance that the fraud which may possibly render a judgent vulnerable to impeachment is "extrinsic" fraud as

distinguished from "intrinsic" fraud, or, in other words, fraud collateral to the matter tried as distinguished from fraud connected with the merits of the controversy. In discussing what constitutes "extrinsic" fraud, this Court, in the leading case of *U. S.* v. *Throckmorton*, 98 U. S. 61, said at pages 65 and 66:

> "But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing. See Wells, Res Adjudicata, Section 499; *Pearce* v. *Olney*, 20 Conn., 544; *Wierich* v. *DeZoya*, 7 Ill. 385; *Kent* v. *Ricards*, 3 Md. Ch. 392; *Smith* v. *Lowry*, 1 Johns. (N. Y.), Ch. 320; *DeLouis, et al.* v. *Meek, et al.*, 2 Iowa 55."

See also:

Wright v. *Saltmarsh*, 174 Oklahoma 226;
Jacobowitz v. *Herson*, 268 N. Y. 130, 133, 134.

The distinguishing character of "extrinsic" fraud is that it is that kind of fraud which prevents an adversary trial upon the issues. If a party has lost his case by false swearing, perjury, concealment, etc., all of which go to the merits of the controversy and the issue before the court and none of which prevents him from having an adversary trial on

the merits, then he has his remedy by way of new trial, appeal, error, vacation, etc., but once the judgment has become final it is conclusive upon him and cannot be collaterally attacked. The principle, although it may operate harshly in some instances, is a rule of necessity—the public necessity that there be some time an end to litigation. As has been shown, heretofore, non-disclosure of lack of capacity to sue or that the petitioner is not a real party in interest does not constitute fraud under any definition for the obvious reason that a party is not required to disclose to his adversary facts which would defeat his recovery. If such nondisclosure be accompanied by concealment or false swearing or perjury, it can rise only to the dignity of "intrinsic" fraud and furnishes no basis for a collateral attack upon the judgment.

Toole v. *Fite*, 57 Utah 1;
Borgos v. *Price*, 140 N. Y. Misc. Rep. 287;
Harrington v. *Denny*, 3 Fed. Supp. 584, 593, 594 (appeal dismissed 68 F. (2d) 1004);
Matter of Holden, 271 N. Y. 212.

It should be noted, moreover, that the term "extrinsic fraud" means actual fraud. It signifies a case where one knowingly and deliberately seeks to take undue advantage of another for the purpose of defrauding him; and this is true as well, in a case where the fraud consists of a concealment.

Freeman on Judgments, 5th Ed. page 2569;
Dockery v. *Central*, 45 Arizona 434;
Ward v. *Southfield*, 102 N. Y. 287.

In this case there is absolutely no connection whatsoever between petitioner's arrangement to distribute the proceeds of suit and the respondent's obligation to return petitioner's 250 shares of stock and his obligation to account with respect to the moneys received by him during his possession

thereof. What undue advantage was taken when petitioner obligated himself to make distribution of the proceeds of his claim to his wife and to creditors, retaining the right to any balance remaining thereafter? What fraud was perpetrated by this arrangement upon respondent—one who has no interest whatsoever in what petitioner seeks to accomplish with the proceeds of his claim? If petitioner had assigned his claim to petitioner's brother and if petitioner's brother had reassigned it by simple instrument prior to petitioner's suit against respondent, then, certainly, it could not be contended that petitioner was under duty to reveal what had occurred to the New York court. This hypothetical illustration is, in effect, the instant case. The only difference is that the reassignment under review provides for certain beneficial interests—a matter that does not concern the respondent. The hypothetical illustration and the instant case are the same in that in both there is the complete assignment of legal title.

Petitioner proceeded under an instrument of reassignment which indicated to him that he had a perfect right to sue in his own name and it is inconceivable that any court would contend, that petitioner, a layman, armed with that instrument, intended to perpetrate a fraud upon the New York court.

Conclusion.

For the foregoing reasons it is respectfully submitted that the writ of certiorari should issue.

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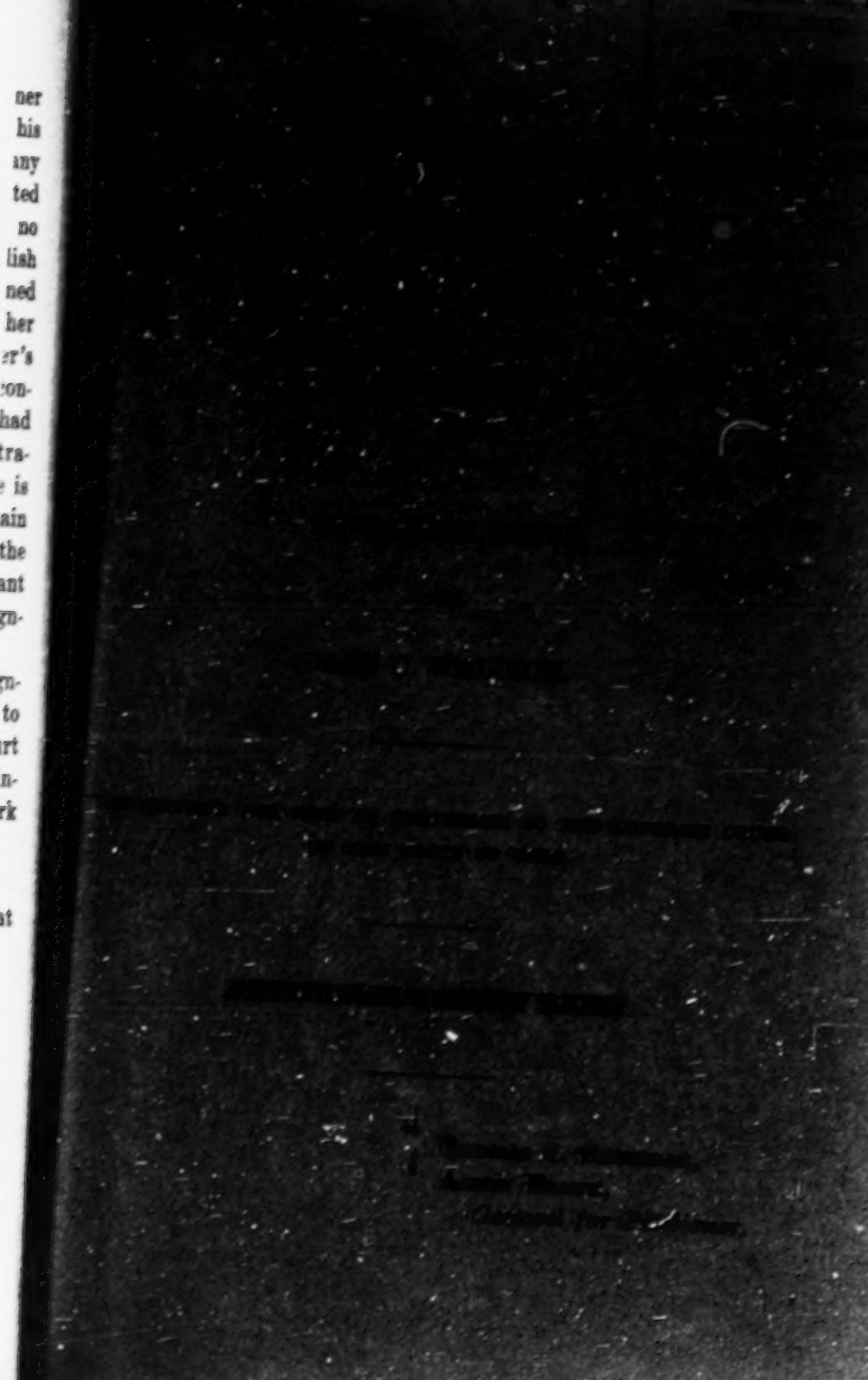

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 188

EDWARD H. TITUS,

Petitioner,

vs.

LOU C. WALLICK.

PETITIONER'S REPLY BRIEF.

A careful reading of respondent's brief—interposed to keep this Honorable Court from reviewing the Ohio judgment—reveals that it is built around a half-hearted assertion that the Ohio trial court found that petitioner was not the real party in interest under the law of the forum and that the Ohio judgment is based, therefore, upon an independent ground of State procedure. Respondent seeks to invoke the principle that where an appellate process brings a judgment of a State court before the Supreme Court for review, this Honorable Court will inquire whether the judgment of the State court was based upon a non-Federal ground *adequate to support it.*

Robertson and Kirkham on "Jurisdiction of the Supreme Court of the United States", pages 149, 150;
Bell Telephone Co. v. Van Dyke, 296 U. S. 533;
Bass v. Milledgeville et al., 295 U. S. 721.

The foregoing principle has been applied to prevent consideration of Federal rights where the ruling of the State court was based on such independent grounds as a voluntary payment of taxes, *res judicata*, laches and the statute of limitations.

Gaar, Scott & Co. v. *Shannon*, 223 U. S. 468;
Northern Pacific Railroad Co. v. *Ellis*, 144 U. S. 458;
Moran v. *Horsky*, 178 U. S. 205;
Rector v. *Ashley*, 6 Wall. 142.

It is conceivable that the principle would be accorded recognition where suit on a foreign judgment is defended on the ground of payment after judgment, general release after judgment or lack of capacity to sue by reason of assignment of the judgment and the defense is deemed by the trial court to have been established.

It is noteworthy, however, that the adjudicated cases and the aforementioned illustrations involve non-Federal questions unconnected with a recognized and uncontradicted Federal right. To assert that the judgment creditor may not recover on his judgment in a foreign State because he assigned the judgment after the recovery thereof is not violative of the full faith and credit clause. But to assert that the judgment creditor cannot proceed in another State on the foreign judgment itself by reason of defenses (alleged or real) existing *prior* to its rendition, involves, directly so, *disregarding constitutional safeguards*. That is exactly the instant case. To find that petitioner was not the real party in interest under the Ohio law the Ohio courts determined, first, that petitioner was not the real party in interest in the New York suit, and in making that determination, the Ohio courts went, of necessity, behind the New York judgment, conclusive as to all matters which were actually determined and all matters which *might* have been litigated—including the defense of lack of capacity

to me. *In other words, the so-called non-Federal ground relied upon by respondent is not one independent of the judgment itself* and, therefore, this Honorable Court's jurisdiction to review cannot be contradicted. Any other view of the situation would mean that "a non-Federal ground" could be used as a pretext or cloak to evade a decision of a Federal question and constitutional safeguards might be so warped by State courts as to become "sound and fury, signifying nothing".

The foregoing is not mere theorization. It is simply an oft-repeated and well-established amplification of the rule that the Supreme Court will not assume jurisdiction where a State court based its judgment on a non-Federal ground *adequate to support it*. True amplification of the general principle comprehends three factors: (1) the non-Federal ground must be broad enough to sustain the judgment; (2) it must be independent, that is, *not so interwoven with the Federal question as to be inescapable of separate treatment and determination;* and (3) *a non-Federal ground, plainly untenable, will not defeat review.*

Robertson and Kirkham on "Jurisdiction of the Supreme Court of the United States", pages 156-158;
Creswill v. *Grand Lodge Knights of Pythias of Georgia*, 225 U. S. 246, 261;
Enterprise Irrig. Dist. v. *Canal Co.*, 243 U. S. 157, 163-165;
Ward et al. v. *Love County*, 253 U. S. 17, 22;
Davis v. *Wechsler*, 263 U. S. 22, 24;
Moran v. *Horsky*, 178 U. S. 205.

In *Gaar, Scott & Co.* v. *Shannon, supra*, relied upon by respondent, the principle is expressed in the following language on page 471:

"It is, however, equally well settled that if the Federal question is properly presented and necessarily

> controls the determination of the case, the appellate jurisdiction of this court is not defeated because the decision is put upon some matter of local law. West Chicago R. R. Co. v. Chicago, 201 U. S. 506, 520."

Not only is it clear that the Ohio courts disregarded the full faith and credit clause when they went behind the New York judgment to find that petitioner was not the real party in interest—a ground dependent upon and interwoven with the Federal question—but it is also clear that the non-Federal ground is plainly untenable in view of the abundance of authority on the point that the instrument of reassignment (Petitioner's Exhibits D, E) constituted petitioner the real party in interest. (See Petitioner's Point IV.) The latter disposes, as well, of respondent's reliance on the doctrine expressed in *Klinger* v. *Missouri*, 13 Wall. 257, that where it does not appear upon which of two grounds the decision was based, whether the Federal or non-Federal ground, then this Honorable Court will refuse jurisdiction only if the non-Federal ground (assuming it is independent) is *"a good and valid one"*.

Respondent's contention that it does not appear that the Ohio courts dealt with any Federal question is completely answered on pages 17 and 18 of petitioner's main brief. The Ohio Supreme Court ruled specifically on petitioner's appeal as a matter of right. It may also be stated, parenthetically, that respondent has overlooked petitioner's motion to strike respondent's answer from the files on constitutional grounds (R. 45-47; 52; 101) and that he has likewise disregarded the doctrine that no particular words or phrase are necessary to raise a constitutional question. (See Petitioner's Point I.)

Respondent's fifth proposition, that this Honorable Court will not review the findings upon which the Ohio courts determined that petitioner was not the real party in interest

and that he perpetrated a fraud upon the New York court, is without basis because the findings are completely interwoven with the denial of full faith and credit to petitioner's judgment. (See authorities cited on page 23 of Petitioner's Main Brief.) The Court of Appeals' view that the affidavit (Respondent's Exhibit 7) referred to petitioner's status as of November 23, 1925, left the Ohio adjudication, that petitioner was not the real party in interest and that he perpetrated a fraud, as contrary to the evidence and contrary to law.

The mere enumeration of the following matters raised in petitioner's main brief which respondent has avoided answering bespeaks tacit admission on respondent's part of petitioner's right to relief herein:

1. Respondent has carefully avoided denial of the fact that an adversary trial was had.

2. Respondent has refrained from commenting on the *Clarkson* case, 274 N. Y. 69 (Petitioner's Brief, page 31), pursuant to which petitioner was at least a trustee, capable of bringing suit.

3. Respondent has ignored the historical significance of the "attorney in fact" clause in the reassignment (Petitioner's Brief, page 32).

4. He has disregarded the fact that petitioner is fully capable of granting him complete discharge from his indebtedness (Petitioner's Point IV).

5. He has avoided the charge that a refusal to grant petitioner relief herein would permit respondent to profit from a fraud *proved by documentary evidence* (Petition, page 10).

6. Just as respondent would have had the burden in establishing the defense of payment, release, statute of limita-

tions or assignment of judgment, so he had the burden of proving that petitioner's judgment was impeachable for extrinsic fraud in New York if petitioner was not the real party in interest; and this burden respondent did not meet (Petitioner's Brief, page 26). Respondent makes the ridiculous attempt (Respondent's Brief, page 30) to assert that the New York courts have held that an alleged partial assignment of petitioner's claim to London I. Wallick constituted a fraud upon the court, when all that occurred was that a new trial was granted so that a trial court could weigh the testimony of London I. Wallick in the light of his alleged claim.

7. Respondent has failed to disprove the fact that he possessed knowledge, in March, 1929, of petitioner's prior assignment and that he failed to interpose an appropriate defense in the New York action (Petition, pages 8, 9).

Conclusion.

It is respectfully submitted that the writ of certiorari should issue.

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DEC 20
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 188

EDWARD H. TITUS,

Petitioner.

vs.

LOU C. WALLICK.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR PETITIONER.

THOMAS I. SHERIDAN,
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REME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 188

EDWARD H. TITUS,

Petitioner,

vs.

LOU C. WALLICK.

T OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR PETITIONER.

Preliminary Statement.

case is in this Court on certiorari to the Supreme f Ohio. Petitioner prayed for the writ on the ground l faith and credit was denied by that Court to a final nt recovered by the petitioner against respondent upreme Court of the State of New York.

lay 1, 1934, petitioner recovered a judgment in the e Court of the State of New York against the re- it in the sum of $389,103.21 (R. 18-21). In August,

1934, petitioner instituted an action in the Common Pleas Court, Franklin County, Ohio (hereinafter referred to as the Common Pleas Court) for the purpose of making the judgment of the Supreme Court of the State of New York a judgment in the State of Ohio (R. 1, 7).

Petitioner's action in the State of New York was instituted on December 22, 1925 (R. 133) and was bitterly contested by respondent. The action was tried twice in the Supreme Court of the State of New York (R. 106; 118) and it was submitted upon five occasions to the Appellate Division of the Supreme Court of the State of New York, First Department (R. 93, 132, 121, 134, 77, 78) and once to the Court of Appeals before final judgment was obtained by petitioner (R. 80, 81). In addition, three references were had (R. 91, 101, 102; 18-20). The Ohio courts have predicated refusal to recognize the New York judgment on the ground of fraud (R. 156, 186, 190).

The Opinions of the Courts Below.

The written opinion dated April 21, 1936, rendered in the Common Pleas Court, is not reported, but it is set forth at length in the record on pages 148-156. The written opinion, dated November 30, 1937, of the Court of Appeals, Franklin County, Ohio (hereinafter referred to as the Court of Appeals) is not reported, but it is set forth at length in the record on pages 178-190. The *per curiam* opinion rendered by the Supreme Court of Ohio is reported in 133 O. S. 612.

The written opinion dated December 2, 1927, of the Appellate Division of the Supreme Court of the State of New York, First Department, after the first trial, in the original action, and by virtue of which it was held that petitioner was entitled to recover from respondent 250 shares of stock of the Secor Hotel Company, is reported in 222 N. Y. App. Div. 17; and the written opinion rendered by said Appellate Division of the Supreme Court of the State of New York

after a second trial, granted upon newly discovered evidence, pursuant to which that court's original determination was adhered to, is reported in 235 N. Y. App. Div. 662. The affirmance thereof by the Court of Appeals of the State of New York was rendered without written opinion and a report thereof appears in 260 N. Y. 519.

No written opinion was rendered by the Appellate Division of the Supreme Court of the State of New York when said court affirmed an order granting a second trial on the ground of newly discovered evidence; nor did said court render written opinions when it vacated the second referee's report and appointed Honorable Jeremiah T. Mahoney as referee and when it affirmed the judgment in favor of petitioner and against respondent in the sum of $389,103.21. Said decisions are reported in 227 N. Y. App. Div. 789; 240 N. Y. App. Div. 818; and 244 N. Y. App. Div. 789, respectively.

Statement of the Case.

The action in the State of New York was instituted by petitioner, by reason of a fraud perpetrated by respondent, to impress a trust on 250 shares of the Secor Hotel Company, an Ohio corporation, representing a one-quarter interest therein (R. 9, 11-13). The action was one in equity and the relief demanded in the complaint contemplated the return of petitioner's 250 shares of stock in the corporation, together with an accounting of the earnings of the Secor Hotel Company since its inception and of the sums received by respondent as dividends or *otherwise*, with respect to the moneys applicable to petitioner's one-quarter interest (R. 13). Petitioner's complaint set forth the fraudulent conduct of respondent in connection with said stock and the resultant injury to petitioner (R. 10-13). In deciding that petitioner was entitled to the return of the stock the Appellate Division of the Supreme Court of the State

of New York stated that petitioner's version as to respondent's fraud was amply supported by the documentary evidence in the case (222 N. Y. App. Div. 17); and when said Appellate Division of the Supreme Court of the State of New York again recognized petitioner's ownership of said stock, after a new trial had been granted on the ground of newly discovered evidence, that court stated that the additional testimony was not of sufficient weight to cause the court to change the determination, in favor of petitioner, reached on the original appeal and for the second time rendered judgment for petitioner (235 N. Y. App. Div. 662). This judgment was affirmed by the Court of Appeals of the State of New York on July 19, 1932 (260 N. Y. 519), and thereafter a reference was had which resulted in the award to petitioner in the sum of $389,103.21 (R. 18-21, 78).

At the time of the institution of the action by petitioner, as plaintiff, in the Common Pleas Court, and at the present time, the judgment in the State of New York in favor of the petitioner and against respondent was and is a final judgment in said State of New York (R. 45, 55, 56). The jurisdiction of the Supreme Court of the State of New York has been conceded by respondent (R. 149, 133, 134, 54) and *no attempt has been made by him to impeach or set aside said judgment on any ground in the State of New York* (R. 46, 49).

The petition filed by petitioner in the Common Pleas Court, on August 20, 1934, alleged the recovery of the aforesaid judgment and attached to said petition was a transcript of the judgment recovered in the State of New York, authenticated as required by the Act of Congress (R. 8, 18-22).

Respondent's amended answer thereto averred three defenses: (1) that the judgment sued upon was not responsive to the issues made by the pleadings; (2) that peti-

tioner was not the real party in interest; and (3) that the judgment in the State of New York was procured by fraud practiced upon the Supreme Court of that State and upon the respondent, in that petitioner was not the real party in interest and suppressed and withheld this fact from the Supreme Court of the State of New York (R. 40, 41). The defenses were predicated, presumably, upon exceptions to the rule that full faith and credit shall be given by each State to the judgments of a sister State. By further amendment respondent's answer set up Section 210 of the Civil Practice Act of the State of New York requiring, with certain exceptions, that every action must be prosecuted in the name of the real party in interest (R. 41, 42).

Petitioner and respondent waived a trial by jury in the Common Pleas Court (R. 44). The evidence in the case was largely documentary and petitioner relied wholly upon the judgment recovered by him in the Supreme Court of the State of New York, duly objecting and taking exception to the introduction of any evidence by respondent in derogation of said judgment (R. 52, 55-58). The trial court found against the respondent on the first defense (R. 149) but in favor of respondent on the second and third defenses, thereupon entering judgment for the respondent on December 3, 1936 (R. 149, 156, 157, 166). The judgment of the Common Pleas Court was affirmed by the Court of Appeals and judgment was entered, with respect thereto, on the 14th day of February, 1938 (R. 190). Petitioner then appealed to the Supreme Court of Ohio (R. 193, 195) under Article IV, Section 2 of the Constitution of Ohio, which gives that court jurisdiction as a matter of right in cases, among other things, involving questions arising under the Constitution of the United States; and petitioner further moved said Supreme Court of Ohio for an order directing the Court of Appeals to certify to the Supreme Court of

Ohio its record for review (R. 198, 199). On April 27, 1938, the Supreme Court of Ohio dismissed petitioner's appeal as of right and granted respondent's motion to dismiss the appeal as of right, so ordering and adjudging on the ground that no debatable constitutional question was involved (R. 195). The Supreme Court of Ohio likewise denied petitioner's motion for an order directing the Court of Appeals to certify to the Supreme Court of Ohio its record for review (R. 195). Five of the seven Judges sitting in the Supreme Court of Ohio rendered the aforementioned decision without opinion, 133 O. S. 612.

A brief summary of the facts leading up to the rendition of the judgment in the Supreme Court of the State of New York and the subsequent judgment in the Common Pleas Court, gives full expression to petitioner's claim that the Ohio courts failed to give full faith and credit to the judgment of the Supreme Court of the State of New York.

Prior to 1924 petitioner had a substantial claim against respondent based upon respondent's fraud in connection with petitioner's 250 shares of stock of the Secor Hotel Company of Toledo, Ohio, which had been withheld from him by respondent for many years (R. 9-13). On or about March 31, 1924, petitioner assigned said claim to his brother, Walter Titus, under an oral understanding with regard to the use of any funds which might be derived therefrom in part to pay off and discharge certain indebtedness of petitioner and in part for the benefit of petitioner's wife (R. 147, 83-85). The assignment was in writing and absolute upon its face.

Approximately three weeks before the commencement of the New York action and on or about December 1, 1925, an instrument (R. 83-85, 85-88; Petitioner's Exhibits D, E) was executed by Walter Titus in order to define more effectively the rights of the various interested parties in said

claim and in order that suit might be brought thereon. This instrument, after referring to the prior assignment and the oral understanding pursuant to which it was made, assigned said claim to petitioner by appropriate words and appointed petitioner as attorney-in-fact to effectuate collection of the claim. It then provided that any money or other property collected upon said claim should be turned over to Walter Titus to be held and used by him, first, toward the payment of the expenses incurred in the collection of the claim, second, to the payment of one-half thereof to the wife of petitioner, third, to the payment or discharge of certain indebtedness of petitioner, and fourth, the balance remaining, if any, to be paid to petitioner. Shortly after said reassignment, suit was instituted by petitioner on this claim in the Supreme Court of the State of New York, and said suit resulted in the judgment hereinbefore referred to (R. 133).

After petitioner recovered judgment in the Supreme Court of the State of New York, one London I. Wallick, the brother of respondent, made claim against petitioner for a share in the proceeds, if any, to be realized from said judgment. (Respondent's Exhibit 7; R. 137-146.) London I. Wallick claimed that an agreement to that effect was made with petitioner on or about November 23, 1925 (R. 141, 93). Petitioner and London I. Wallick were in sharp conflict over whether any such agreement had been made and as to the validity and effect of any writing as evidence of such agreement. Approximately nine years after the institution of suit in the State of New York by petitioner against respondent, said London I. Wallick filed suit against petitioner in the Supreme Court of the State of New York, in which he asked for an injunction *pendente lite*, restraining petitioner from disposing of *any* of the moneys received or collected upon said judgment recovered by petitioner against re-

spondent (R. 137, 138). Petitioner defended said suit and submitted therein an affidavit, dated August 17, 1934, in opposition to the prayer for said injunction. Said affidavit set out at considerable length the history of the transactions between petitioner and respondent and London I. Wallick, relative to the subject matter of the action upon which judgment had been entered for petitioner and, among other things, petitioner's affidavit (R. 141, 145, 146; Respondent's Exhibit 7) set forth the following: "I told him (London I. Wallick) at that time (November 23, 1925) that I had already assigned any interest in the proceeds of said action against Lou C. Wallick to Walter L. Titus and Emilie F. Titus. * * * The plaintiff's application for an injunction *pendente lite* should be denied. Prior to my execution of the instrument of November 23, 1925 (between plaintiff and London I. Wallick), I assigned my interest in my claim against Lou C. Wallick to Walter L. Titus, my brother, and Emilie F. Titus, my wife. The plaintiff herein knew of this assignment before the instrument of November 23, 1925, was executed. It is respectfully submitted that it does not lie within the jurisdiction of this court to now enjoin what has already been accomplished." The words within parenthesis are petitioner's, submitted, presently, for explanatory purposes.

The affidavit was directed specifically to occurrences on and the status as of November 23, 1925 (R. 181, 184, 185). In opposing the motion for the all-inclusive, temporary injunction, petitioner, being entitled to every possible, proper, legal objection, contended, in effect, that London I. Wallick was not entitled to the temporary injunction because he knew of the prior assignment made by petitioner to his brother on March 31, 1924 (R. 95-101, 141), and that said London I. Wallick was not entitled to more than the alleged contract itself contemplated, that is, an interest subject to a known prior assignment. Specifically, whatever occurred

after November 23, 1925, did not concern London I. Wallick, and as far as the latter was concerned, petitioner was entitled to assert such facts as would reveal to the Supreme Court of the State of New York that London I. Wallick, based upon his alleged contract of November 23, 1925, was not entitled to the unusual remedy of an injunction. The substance of petitioner's affidavit was that London I. Wallick could not enjoin what he knew and contemplated could not be enjoined as of November 23, 1925. His proper remedy, if any, was indicated to him in said affidavit interposed by petitioner, to wit, an action to set aside the assignment under the Debtor and Creditor Law of the State of New York (R. 146).

The Court of Common Pleas seized upon the language contained in the affidavit, to assert that petitioner was not the real party in interest in the New York suit, that he had withheld that fact from the New York court and that he was, therefore, not the real party in interest in the suit commenced in Ohio (R. 153-156).

The Court of Appeals characterized the statements, upon which the Court of Common Pleas relied, as mere conclusions with respect to a status prior to the commencement of the New York action (R. 181, 184, 185); but although it adopted reasoning other than that adhered to by the Common Pleas Court (R. 184, 185) it held that petitioner was not the real party in interest in the State of New York under the written reassignment of December 1, 1925, because that instrument constituted petitioner an attorney-in-fact only (R. 182)—a holding contrary to the decisions of the State of New York and to the general principles as enunciated by other courts as to what constitutes a person the real party in interest.

The Court of Appeals, having found by its interpretation of the reassignment of December 1, 1925, that the petitioner was not the real party in interest, then held that he had sup-

pressed and concealed this fact from the New York court, as evidenced by the statements contained in the affidavit (R. 186, 189, 190). While characterizing the statements as mere conclusions (R. 184, 185), referring to a status prior to the commencement of the New York action, that court nevertheless held that the petitioner in making such statements indicated that he knew at the time the action was filed in New York that he was not the real party in interest in the suit. In other words, the Court of Appeals, by virtue of statements made in a collateral proceeding some nine years later, held that the petitioner's state of mind at that time, as indicated by his statements, was such that by necessary inference his state of mind must have been the same nine years before when he filed the suit in New York, and therefore at that time knew that he had no right to file it.

In arriving at its conclusion to affirm the judgment in favor of the respondent granted by the Common Pleas Court, the Court of Appeals virtually disregarded the fact that in 1929 respondent moved in the Supreme Court of the State of New York for a new trial on the ground of newly discovered evidence and that respondent submitted therein an affidavit of one Gentsch, sworn to on March 9, 1929, in which certain matter is set forth with regard to an assignment by petitioner to Walter L. Titus and to petitioner's wife (R. 190, 95-101). *Respondent possessed knowledge in March, 1929, of a prior assignment made by petitioner, and respondent made inquiry with regard thereto on the second trial held in 1930* (R. 119, 120). At that time petitioner testified, on cross-examination, with regard to the assignment. Petitioner testified that he did have an agreement with his brother, Walter Titus, and that it had always been a matter between them. Respondent's counsel proceeded to interrogate petitioner with regard thereto but did not press the point, in his cross-examination, to the extent of ascertaining the exact character of said assignment; *and despite said*

evidence, putting the respondent on inquiry as to a prior assignment of petitioner's claim, respondent made no effort to amend his pleading for the purpose of setting forth a defense with respect thereto.

ARGUMENT.

Summary of the Argument.

POINT I—The controlling authorities in this Court indicate that parties to an action cannot, in a collateral proceeding, impeach a judgment for fraud in the obtaining thereof.

POINT II—Petitioner's judgment remains unimpeached and unimpeachable in the State of New York and, therefore, it was not properly subject to collateral attack in the Ohio courts.

POINT III—Petitioner was the real party in interest in the suit commenced by him in the Supreme Court of the State of New York by virtue of his legal ownership of the claim against the respondent as well as his beneficial interest therein.

POINT IV—The judgment recovered by petitioner in the State of New York is conclusive upon whether petitioner is the real party in interest.

POINT V—Petitioner was not guilty of any fraud on the New York court and even if he was, it did not constitute extrinsic fraud and it did not justify a denial of full faith and credit to the New York judgment.

POINT VI—The findings, conclusions and judgments rendered in the Courts of the State of Ohio are contrary to the evidence and contrary to law.

Point I.

Fraud in Obtaining a Judgment Furnishes no Ground for Collateral Attack.

In *Freeman on Judgments* (5th Ed.), pages 633 and 663, the view is expressed that *parties to an action*, as distinguished from third parties, may not attack a judgment collaterally for fraud, except possibly such fraud which goes to the question of jurisdiction.

See:

Christmas v. *Russell*, 72 U. S. 290, 304-307;
Petroleum Auditors Assoc. v. *Landers*, 182 Okla. 297;
Johnson v. *Petty*, 118 Okla. 178.

This Court has stated, clearly and unequivocally, that fraud in procuring a judgment cannot be set up, by way of collateral attack, to bar recovery thereon. The principle may be expressed by the statement that a judgment may be assailed for want of jurisdiction, but not otherwise.

Christmas v. *Russell*, 72 U. S. 290, 303-306; cited in
Fauntleroy v. *Lum*, 210 U. S. 230, 236, 237;
Hanley v. *Donoghue*, 116 U. S. 1, 4;
Simmons v. *Saul*, 138 U. S. 439, 458;
Thompson v. *Whitman*, 85 U. S. 457;
Maxwell v. *Stewart*, 89 U. S. 77, 81.

The view enunciated in *Christmas* v. *Russell*, *supra*, was reiterated in *Phillips* v. *Griffin*, 236 N. Y. App. Div. 209, at page 211, wherein the court stated that "to raise an issue of fraud, recourse must be had to a suit in equity."

See also:

Scarborough v. *Long*, reported in 197 S. E. 796 (Supreme Court of Georgia, June 14, 1938);
Farrell v. *Kingshighway Bridge Co.*, reported in 117 S. W. (2d) 693 (St. Louis Court of Appeals, Missouri, June 7, 1938);
Reed v. *Futrall*, reported in 115 S. W. (2d) 542 (Supreme Court of Arkansas, April 11, 1938).

In the New York action by petitioner—an equity suit—all that the court required was jurisdiction over the person of the respondent. It acquired that jurisdiction, concededly (R. 149, 133, 134, 54). The failure to recognize the New York judgment in Ohio was based, essentially, on the lack of capacity to sue; but this Court has held that a lack of capacity to sue is not an objection that goes to the jurisdiction of the court.

McCandless v. Furland, 293 U. S. 67, 75.

It follows, therefore, that any claim with respect to lack of capacity to sue on the part of petitioner could not possibly involve fraud as to jurisdictional facts. Fraud as to jurisdictional facts can relate only to such facts as induce the court to assume jurisdiction.

Petroleum Auditors Assoc. v. Landers, 182 Okla. 297.

In *United States v. Throckmorton*, 98 U. S. 61, it was pointed out that extrinsic fraud, as distinguished from intrinsic fraud, may be utilized for the purpose of attacking a judgment, *but the opinion defines extrinsic fraud as relating to a case in which the fraud is of such a character that it prevents an adversary trial* and a disposition of the merits of the cause. It should be noted that the *Throckmorton* case involved an attack upon a judgment by way of a *direct* proceeding, as distinguished from a *collateral* proceeding.

The fundamental distinction between collateral and direct attack, on the basis of fraud, led the Supreme Court of Minnesota in *In re Melgaard's Will*, 200 Minn. 493, to state, in discussing the *Throckmorton* case, that:

> "Only after it has been determined, by other and appropriate standards, to be direct attack, on the ground of fraud, can the distinction between that which is extrinsic and that which is intrinsic find the subject-matter for its operation. In order to be open to collateral attack a judgment must be void on the face of the record, as for want of jurisdiction."

In *Milwaukee County* v. *White Co.*, 296 U. S. 268, this Court stated the following on page 275:

> "A cause of action on a judgment is different from that upon which the judgment was entered. In a suit upon a money judgment for a civil cause of action the validity of the claim upon which it was founded is not open to inquiry, whatever its genesis. Regardless of the nature of the right which gave rise to it, the judgment is an obligation to pay money in the nature of a debt upon a speciality. Recovery upon it can be resisted only on the grounds that the court which rendered it was without jurisdiction, *Pennoyer* v. *Neff*, 95 U. S. 714; *D'Arcy* v. *Ketchum*, 11 How. 165; *Tilt* v. *Kelsey*, 207 U. S. 43; or that it has ceased to be obligatory because of payment or other discharge; *Anderson* v. *Clark*, 70 Ga. 362; *Haggerty* v. *Amory*, 7 Allen (Mass.) 458; *First Nat. Bank* v. *Hahn*, 197 Mo. App. 593; 196 S. W. 489; *Revere Copper Co.* v. *Dimock*, 90 N. Y. 33; or that it is a cause of action for which the state of the forum has not provided a court, *Anglo-American Provision Co.* v. *Davis Provision Co.* (No. 1), 191 U. S. 373; compare *Kenney* v. *Supreme Lodge*, 252 U. S. 411, unless it is compelled to do so by the privileges and immunities clause; compare *Douglas* v. *N. Y., N. H. & H. R. Co.*, 279 U. S. 377; *McKnett* v. *St. Louis & S. F. Ry. Co.*, 292 U. S. 230, and *Broderick* v. *Rosner*, *supra*; or possibly because procured by fraud, compare *Christmas* v. *Russell*, 5 Wall. 290; *Maxwell* v. *Stewart*, 22 Wall. 77; *Hanley* v. *Donoghue*, 116 U. S. 1; *Simmons* v. *Saul*, 138 U. S. 439, with *Webster* v. *Reid*, 11 How. 437; *McNitt* v. *Turner*, 16 Wall. 352; *Cole* v. *Cunningham*, 133 U. S. 107, 112."

It is, however, extremely important to observe that in cases such as *United States* v. *Throckmorton*, 98 U. S. 61; *Cole* v. *Cunningham*, 133 U. S. 107, 112, and *United States* v. *Atkins*, 260 U. S. 220, when this Court discussed the question as to whether extrinsic fraud will bar enforcement of a judgment, a *direct proceeding*, attacking the judgment, was

under consideration; while in *Webster* v. *Reid*, 52 U. S. 437, and *McNitt* v. *Turner*, 83 U. S. 352, suit was brought not to enforce a judgment, but to recover land purchased either under an execution sale or a court decree. In the two latter cases vacation of a judgment was not an objective in the action; the judgment was brought collaterally before the court as evidence and it was held therefore that, similarly, consideration might possibly be given, collaterally, to the subject of extrinsic fraud. The judgment in both the *Webster* case and the *McNitt* case was asserted against one who had no opportunity to contest the matter in the original action and the judgment recovered could not, therefore, serve as an estoppel against the party alleging the fraud. The judgment was offered as ordinary evidence to substantiate a title; and the judgment was subject to ordinary rules of evidence. Neither the *Webster* nor *McNitt* case involved a suit on the judgment itself against the judgment-debtor.

It may be added that *Webster* v. *Reid, supra*, referred to a fraud which ran to the question as to whether jurisdiction was acquired and that *McNitt* v. *Turner, supra*, was a case which upheld the judgment and mentioned, incidentally, that fraud may be asserted collaterally. The opinion in the *McNitt* case does not, however, describe the type of fraud that may be asserted, but the statement follows reference to the matter of jurisdiction and there is clear indication that the fraud which the court had in mind, at that time, was fraud which goes to the question of jurisdiction. In this respect both the *McNitt* and *Webster* cases are completely reconcilable with the doctrine enunciated in *Christmas* v. *Russell, supra.*

Respondent has, in the past, relied upon a number of cases in various State courts to show that fraud may be utilized for the purpose of attacking a judgment. It is significant that an examination of such authorities will reveal

that they may be classified in the following manner: (1) a number of cases involve fraud in obtaining jurisdiction; (2) other opinions uphold a judgment and go on to state, generally, that the judgment is not conclusive if fraud is established, but they do not indicate whether they mean thereby that the fraud shall be utilized in a direct attack or that it may be utilized by way of collateral attack; and (3) some cases relate to instances in which no adversary trial was had.

It is noteworthy that respondent's answer, interposed in the Ohio suit, did not seek to vacate the judgment recovered by petitioner in the State of New York and that the judgment in the Ohio suit did not set aside the New York judgment. The proceedings in Ohio did not involve a direct attack upon the New York judgment.

In the light of the very definite distinction that is drawn between *direct* attack and *collateral* attack the statement in *Milwaukee County* v. *White Co.*, 296 U. S. 268, 276, that recovery on a judgment may be resisted "possibly because procured by fraud", is entirely clear and completely reconcilable with the earlier authorities. It is expressive of the recognized distinction between *direct attack*, which may be countenanced and *collateral attack*, such as the instant case, which will not be countenanced.

Point II.

The Judgment Remains Unimpeached and Unimpeachable in New York and it is Therefore Not Subject to Collateral Attack in Ohio.

The law is well-settled that a judgment of a State court, which had jurisdiction, is entitled in the courts of other States to the same credit, validity and effect which it has in the State in which it was rendered.

Roche v. *McDonald*, 275 U. S. 449, 451, 452.

It follows, therefore, that the New York judgment could be set aside in Ohio for extrinsic fraud only if it could be shown, first, that New York would characterize knowledge of lack of capacity to sue, as one form of extrinsic fraud and, second, that New York would recognize that extrinsic fraud is a proper ground for collateral attack.

Just as respondent would have had the burden in establishing affirmative defenses, such as payment, release, statute of limitations or assignment of the judgment, so he had the burden of proving that the New York judgment was impeachable in that State for extrinsic fraud, if petitioner was not the real party in interest. This burden the respondent failed to meet. No authority whatsoever was furnished on this point by the respondent or by either of the lower courts in Ohio.

Assumptions by a foreign court as to what the New York court should regard as extrinsic fraud are completely unwarranted. An Ohio court cannot assert that a New York court *should* consider itself as having been subjected to extrinsic fraud. To disregard petitioner's judgment it was absolutely necessary for respondent to establish that a New York court *would* consider itself as having been subjected to extrinsic fraud—and only adjudication on this point can be regarded as conclusive. In summary, it is for the New York court—and only the New York court—to state whether its judicial process has been outraged. That statement must be found in the litigated case or in cases of similar nature. Respondent failed completely in his efforts to meet this test.

The New York viewpoint with regard to the effectiveness of a judgment is well stated in *Phillips* v. *Griffin*, 236 N. Y. App. Div. 209, at p. 211:

> "The question involves consideration of the full faith and credit clause of the Federal Constitution. (Art. 4, Sec. 1.) A judgment of a sister state may be assailed for want of jurisdiction over either the person or the

subject-matter but not otherwise. (*Andrews* v. *Andrews*, 188 U. S. 14; *Clarke* v. *Clarke*, 178 id. 186). * * * *If it was intended by defendant to raise an issue of fraud, recourse must be had to a suit in equity.* (*Ferguson* v. *Crawford*, 70 N. Y. 253; *Mayor, etc. of New York* v. *Brady*, 115 id. 599, 617.)" (Italics ours.)

See also:

Boston & Maine R. Co. v. *D. & H. Co.*, 268 N. Y. 382, 391.

The recent case of *Matter of Holden*, 271 N. Y 212 is absolutely conclusive upon the point that petitioner's judgment would not be impeached in New York.

As in the *Holden* case no one may question the validity of the reassignment to petitioner except the assignor and, possibly, petitioner's wife and London I. Wallick, who commenced suit in the State of New York against the petitioner, requesting therein a temporary injunction. As in the *Holden* case the respondent is obligated to make payment to the party who appears to be the legal owner of the claim and no court is empowered to inquire into collateral matters which have no effect whatsoever upon respondent's obligation to account with respect to petitioner's 250 shares of Secor Hotel stock.

The real claim in the *Holden* case was that the party who had obtained the proceeds of a condemnation award by court order knew that he had no right to sue therefor by reason of the fraud which he had perpetrated in obtaining an assignment of the condemnation award; but the New York Court of Appeals did not permit this factor to result in the impeachment of the judgment.

Quite in accord with the principles enunciated by this Court, the New York authorities do not adhere to the view that a judgment may be subjected to collateral attack on the ground of extrinsic fraud. Such New York cases as *Mayor* v. *Brady*, 115 N. Y. 599; *Ward* v. *Southfield*, 102 N. Y. 287;

Corley v. *N. Y. & H. Rail Co.*, 12 N. Y. App. Div. 409; and *Matter of Holden, supra,* which gave consideration to the question as to whether extrinsic fraud would bar enforcement of the judgment, involved a direct attack, by way of motion for new trial or suit in equity, as distinguished from a collateral attack; and it is apparent, therefore, that the New York authorities adhere to the implied distinction set forth in *Milwaukee County* v. *White Co.*, 296 U. S. 268, 276. The case of *Gray* v. *Richmond*, 167 N. Y. 348, is of no significance because the litigants therein proceeded upon the theory that an Indiana judgment could be attacked collaterally and the New York Court of Appeals relied upon the concession. In addition, *Gray* v. *Richmond, supra,* involved fraud in securing jurisdiction.

Reference has been made to the New York authorities under Point III herein to the effect that the courts in the State of New York will disregard all facts with respect to the purpose of an assignment and the disposition of proceeds of suit if the assignment is fair upon its face. Reference has also been made under Points V and IV herein, respectively, to the view adhered to by the New York courts that an adversary trial will bar attack on a judgment and that technical defenses, such as lack of capacity, will be disregarded.

POINT III.

Petitioner was the Real Party in Interest in the New York Suit.

The trial court in Ohio and the Court of Appeals, prerequisite to their ultimate finding that the New York judgment was obtained by fraud, held that petitioner was not the real party in interest in the New York suit and had no right to bring the suit in his own name. The Court of Appeals did not, however, concur in the reasoning by which the trial court reached this result (R. 181, 184, 185).

The trial court disregarded, erroneously so, the reassignment of the claim to petitioner (on December 1, 1925, and held that petitioner was bound by isolated statements contained in his affidavit of August 17, 1934 (R. 153-156). The Court of Appeals took the proper view, that the affidavit referred to petitioner's status as of November 23, 1925, when legal title to the claim was in petitioner's brother and that whether petitioner was the real party in interest depended upon the legal effect of the reassignment of December 1, 1925 (R. 181, 184, 185). The Court of Appeals then proceeded to find as a matter of law—and in doing so it was completely in error—that the reassignment was a mere naked power of attorney (R. 182). It predicated its decision upon (1) the second paragraph of the reassignment which appointed the assignee (petitioner) as attorney-in-fact for the assignor (petitioner's brother) (R. 181, 182) and (2) upon the fact that petitioner had only a contingent right to share in the proceeds of suit after certain payments (R. 183). The opinion concedes, however, that "it is true the payments in these subheadings were to be made to liquidate the indebtedness" of petitioner (R. 183).

It is apparent, and the Court of Appeals so found, that if the instrument of December 1, 1925 (R. 83), *constituted the petitioner the real party in interest in the New York suit then the petitioner should have prevailed in the Ohio action.* This fact would instantly remove any possibility of fraud upon the New York court, as the only fraud alleged is the concealment from the New York court at the time the suit was instituted that the petitioner was not the real party in interest. *The Court of Appeals also conceded that the execution and delivery of the instrument of December 1, 1925 were undisputed* (R. 184).

The reassignment of December 1, 1925, sets forth an unqualified assignment (R. 83-85, 85-88; Petitioner's Exhibits D, E), appoints petitioner as attorney-in-fact for the assig

nor *but for petitioner's benefit* and provides for the distribution of the proceeds as follows: (1) payment of expenses; (2) one-half of the balance to petitioner's wife; (3) payment of petitioner's debts; and (4) payment of the balance to petitioner.

The effect and validity of the reassignment must be determined in accordance with the law of the place where the reassignment was made, that is, in accordance with the law of the State of New York.

Williston on Contracts, Revised Edition, page 1296;
Barbin v. *Moore,* 85 N. H. 362.

In *Carmody's New York Practice,* the standard work on procedure in that State, Vol. 2, pages 804 to 808, appears the following in reference to the "real party in interest" statute when the question of an assignment is involved:

> "The consideration paid, the purpose of the assignment, the use to be made of any proceeds collected, is immaterial. The plaintiff must have some title, legal or equitable, to the thing assigned. But if the assignee have such title, it is enough. So it is of no moment that no consideration was paid for the demand by the assignee, or that others have a claim on the assignee for a portion or for all the proceeds, or that the assignment was made merely for the purpose of bringing an action. The defendant has no legal interest to inquire as to this, for a payment to or recovery by the assignee in such case is a protection to the defendant against any claim that can be made by the assignor. Thus where a judgment recovered by a bank, was, for the bank's convenience, assigned to the cashier by an instrument absolute upon its face, the cashier is the proper party to bring an action upon the judgment as the real party in interest. All that affects the defendant in such case is that the legal title to the judgment is in the plaintiff, so that a payment to, or satisfaction by him would be a full and complete satisfaction as to all others who theretofore had or might thereafter claim an interest in it." (Pp. 806, 807.)

The cases supporting the same principles are:

Sheridan v. *TheMayor*, 68 N. Y. 30;
Schwartz v. *Fletcher*, 238 N. Y. App. Div. 554, 557;
Donlin v. *Carlow*, 120 N. Y. Misc. Rep. 698;
Horne v. *McGinley*, 252 N. Y. App. Div. 296;
Tioga v. *Tidd*, 164 N. Y. Misc. Rep. 273, 286;
Spencer v. *Standard Corp.*, 237 N. Y. 479;
McCauley v. *Georgia R. R. Bank*, 239 N. Y. 514;
Meyers v. *Credit Lyonnais*, 259 N. Y. 399;
Hunter v. *Allen*, 106 N. Y. App. Div. 557;
Allen v. *Brown*, 44 N. Y. 228;
Meeker v. *Claghorn*, 44 N. Y. 349;
Brown v. *Powers*, 53 N. Y. App. Div. 251;
Birdall v. *Read*, 188 N. Y. App. Div. 46;
Hentschel v. *Fidelity, etc.*, 87 F. (2d) 833, 838;
Lentz v. *Oregon*, 116 Oreg. 683;
Seybold v. *Grand Forks*, 5 N. D. 460;
Los Robles Water Co. v. *Stoneman*, 146 Cal. 203;
Elmquist v. *Markoe*, 45 Minn. 305.

This Court has indicated in *Batesville* v. *Kauffman*, 85 U. S. 151, that it is immaterial that the assignor is entitled to part of the proceeds of suit and in doing so it cited the case of *Allen* v. *Brown*, 44 N. Y. 228. It may be interesting to observe that *Batesville* v. *Kauffman, supra*, was relied upon by the United States District Court for the Western District of New York, recently, in holding that on a power of attorney to sue, where there was also an absolute assignment and the assignor retained an interest in the proceeds, the assignee was the real party in interest.

Miele v. *City of Niagara Falls*, 21 Fed. Supp. 442.

The foregoing authorities state not only the New York law but the general law as to who is a "real party in interest"

under modern code provisions. With these authorities in mind it is difficult to follow the reasoning of the Court of Appeals that the reassignment of December 1, 1925, was simply a naked power of attorney and did not constitute the petitioner the real party in interest in the New York suit.

It may be noted, parenthetically, that Section 210 of the Civil Practice Act (New York), pleaded by respondent in his amended answer (R. 41, 42) provides that: "Every action must be prosecuted in the name of the real party in interest, except that * * * a trustee of an express trust * * * may sue without joining with him the person for whose benefit the action is prosecuted." The very least that can be said of the reassignment is that petitioner was, by virtue thereof, the trustee of an express trust. *Hoffman* v. *Foote,* 172 N. Y. 348, 355, expresses the general principle that it is unnecessary to use any particular formula of words in order to create a trust and that principle was given full application in *Banca C. I. Trust Co.* v. *Clarkson,* 274 N. Y. 69, 74. In the latter case the loss suffered by plaintiff was made good by a surety company. It was agreed between plaintiff and the surety company that plaintiff would bring suit in its own name, but for the benefit of the surety company, to recoup the losses, the recovery, however, to be paid to the surety company. Based upon this simple arrangement, *devoid of formality,* the Court of Appeals held that plaintiff was a trustee of an express trust and that it was, therefore, entitled to bring suit in its own name. *Banca C. I. Trust Co.* v. *Clarkson, supra,* is, in and of itself, complete answer to the contention that petitioner was not the real party in interest.

It is well settled, moreover, that an assignor, assigning a claim as security for a debt, still retains sufficient interest in the claim to constitute the assignor the real party in interest. Petitioner had, therefore, a sufficient interest, under the

March 31, 1924 assignment alone, to have brought suit in his own name.

Carmody's New York Practice, Vol. 2, p. 808;
Bachman v. *Hausman*, 241 N. Y. App. Div. 153.

In construing the reassignment, reference may be had to the recitals which show the true intent to make an assignment and not, merely, to appoint an attorney.

The words "sell, assign, transfer and set over" alone effectuate an assignment.

Kalb v. *Leff*, 138 N. Y. Misc. Rep. 830.

In stressing the second paragraph of the reassignment, where petitioner was appointed as the assignor's attorney, the Court of Appeals overlooked the fact that the paragraph is nothing more than a survival of the early law upon the subject of assignments and that it is just a precaution adopted for use in such jurisdictions as still adhere to the common law theory that an assignee must bring suit in the name of his assignor.

Williston on Contracts, Revised Edition, pages 1166-1170, 1294;
People v. *Ladew*, 237 N. Y. 413, at pages 436, 438;
Allen v. *Brown*, 44 N. Y. 228;
Casady v. *Scott*, 40 Idaho 137.

Moreover, the appointment of the attorney provides that petitioner may sell or discharge the claim for his own benefit (R. 84).

The reassignment provides that petitioner, if he collects anything, shall turn the proceeds back to petitioner's brother, but petitioner's brother must use the proceeds in discharging certain indebtedness of the petitioner to petitioner's brother and others, paying one-half thereof to petitioner's wife and the balance to petitioner. These provi-

sions were held wholly inconsistent with an assignment such as would constitute petitioner the real party in interest for the reason that his interest, by virtue thereof, was only contingent (R. 183) and not real, that is to say, he was simply an attorney in fact. This holding is clearly wrong, because what is to be done with the proceeds is no concern of the debtor.

Allen v. *Brown*, 44 N. Y. 228;
Meeker v. *Claghorn*, 44 N. Y. 349;
Wolcott v. *Hillman*, 23 N. Y. Misc. Rep. 459.

In reaching the conclusion that the petitioner was not the real party in interest under the reassignment, the Court of Appeals disregarded entirely the purpose in turning the proceeds of the collection, if any, over to petitioner's brother. The dominant purpose was to pay petitioner's debts to petitioner's brother and others, and to pay petitioner's wife; the balance, if any, to be paid to the petitioner. Petitioner's brother had no interest in the claim other than as security for the payment of the petitioner's debt to him—the balance belonged to the petitioner and his wife. As part of petitioner's brother's security, he was to handle the funds if the petitioner collected any, a provision clearly incidental to the primary purpose of the instrument.

Had petitioner no interest other than payment of his obligations to this brother, they were, after all, his own obligations, which fact alone would give him a real, substantial, beneficial interest. On this point *Brown* v. *Ginn*, 66 O. S. 316, referred to by the Court of Appeals (R. 183), is inapplicable; and, moreover, that case involved a champertous transaction.

Stricks v. *Siegel*, 135 N. Y. Misc. Rep. 608, affirmed as modified 138 N. Y. Misc. Rep. 266.

The Court of Appeals hopelessly confused the question of title to the claim with the question of the disposition of

the proceeds. The distinction was clearly pointed out in *Warshauer* v. *Webb*, 9 N. Y. St. Rep. 529, in that the right of one entitled to a part or all of the proceeds can only attach after the claim has been collected and not before. The very fact that the reassignment requires the petitioner to "endorse, transfer and deliver" (R. 84) the proceeds to petitioner's brother connotes title thereto in the petitioner. As between the assignee and the debtor, the only concern of the debtor is whether payment to the assignee is a complete satisfaction and extinguishment of the claim.

The Court of Appeals relied upon *Spencer* v. *Standard Chemicals Co.*, 237 N. Y. 479, 143 N. E. 651, as supporting its conclusion *and quoted from the headnote* found in the Northeastern Reporter (R. 183), which is inaccurate because, while the opinion itself says that a plaintiff must have "some title, legal or equitable, to the thing assigned", the headnote omits the significant word "some".

In *Cummings* v. *Morris*, 25 N. Y., 625, 627, also relied upon by the Court of Appeals (R. 184), there is nothing therein contained contrary to the well-recognized principle of law already expressed that the purpose of an assignment or the use to be made of the proceeds is immaterial. It states, simply, that an assignee is a real party in interest if, as between assignor and assignee, the transfer is complete, so that the assignor is divested of all control and right to *the cause of action*, and the assignee is entitled to control it (the cause of action) and *receive* its "fruits". Under the New York cases, petitioner had the power to receive the "fruits" of the cause of action. Walter Titus was divested of all control over the cause of action, *as such*, and under the authorities, the power to "receive" need not be coupled with any beneficial interest. Petitioner's beneficial interest cannot be disputed; but it is submitted that even if he had no beneficial interest, he would still be a

real party in interest by virtue of the view expressed in *Cummings* v. *Morris, supra.*

In summary, until the respondent is discharged—and he cannot have any concern in what occurs thereafter—petitioner has legal title under paragraph 1 of the reassignment. By reason of the common law he is given protective powers under paragraph 2—powers not in derogation of the legal title and quite consistent with the assignment itself. And under paragraph 3 he has legal title to both the claim and the proceeds at all relevant times (in so far as respondent is concerned).

Point IV.

The New York Judgment is Conclusive Upon Whether Petitioner is Real Party in Interest.

Whether petitioner was the real party in interest is now immaterial, as the judgment of the New York court is conclusive upon that issue and the question could not be raised in the Ohio action. Lack of capacity to sue is not an objection that goes to the jurisdiction of the court.

McCandless v. *Furland*, 293 U. S. 67, 75.

By paragraph II of his second amended complaint in the New York action (R. 9), petitioner asserted he was the plaintiff in the action and "now is and since in or about the month of October, 1908, has been the owner of a one-quarter interest" in the Secor Hotel Company, represented by 250 shares of the common stock of that company. The ownership of the stock and the alleged interest of petitioner in the company were the basis of petitioner's claim. The complaint then proceeds to set forth the fraudulent conduct of respondent in connection with the stock and the resultant injury to petitioner. By his second amended answer (R. 40) respondent specifically denied the allegations of Paragraph

II of said amended complaint, thus putting squarely in issue the petitioner's ownership of the stock and the claim sued upon. The New York judgment is conclusive, not only as to matters thereby actually determined, but also as to every other matter which might have been litigated and decided upon the issues made in the case, and upon which it was tried. *This doctrine is peculiarly applicable to defenses not going to the merits of the controversy, such as real party in interest, capacity to sue, etc., and a judgment cannot be impeached collaterally by the assertion of such defenses after judgment.*

23 Cyc. 964;
34 C. J. Sec. 859;
Freeman on Judgments, 5th Ed., pages 753-756;
Roby v. *Rainsberger*, 27 O. S., 674;
Smead v. *Fay*, 1 Disney (Ohio) 531;
Abraham French v. *Marx*, 8 N. Y. Misc. Rep. 490;
Phillips v. *Griffin*, 236 N. Y. App. Div. 209;
U. S. v. *California & Oregon Land Co.*, 192 U. S. 355.

It matters not that the plaintiff may have falsely represented or withheld from the defendant his lack of capacity to sue or the fact that he was not the real party in interest.

Toole v. *Fite*, 57 Utah 1.

Whether the respondent knew of the defenses which he failed to assert in the original action is immaterial.

Cauldwell v. *City of New York*, 252 N. Y. App. Div. 559, 562; affirmed 278 N. Y. 7 (Mem.).

Still another principle prevents the respondent from setting up, in the Ohio suit, the defense of the real party in interest, and that is the doctrine that a party cannot set up, after judgment, facts constituting a defense of which he

was ignorant, but which, had he been diligent, he could have discovered.

Toledo Co. v. *Computing Co.*, 261 U. S. 399, 421;
Mayor, etc. v. *Brady*, 115 N. Y. 599;
Harrington v. *Denny*, 3 Fed. Supp. 584, 593; appeal dismissed, 68 F. (2d) 1004;
Moffett v. *Robbins*, 81 F. (2d) 431.

Surprising as it may seem, there is no discussion by the Court of Appeals of this elementary principle of *res judicata* and its application to the instant case (R. 190).

Point V.

The Absence of Extrinsic Fraud.

The Court of Appeals, having determined that the petitioner was not the real party in interest under the reassignment of December 1, 1925, then proceeded to determine whether he suppressed and concealed that fact from the New York court, and if he did, whether he committed such a fraud on the New York court as would deny to the New York judgment full faith and credit in Ohio. The court found the solution of the question "difficult" (R. 186).

In reaching its conclusion that petitioner has concealed and suppressed from the New York court the fact that he was not the real party in interest, the court had recourse to the affidavit filed by the petitioner in the London Wallick action some nine years after the beginning of the original action. The circumstances surrounding the affidavit are fully set forth in the statement of the case (*ante*, pp. 7-9).

Although the Court of Appeals had previously in its opinion characterized parts of the affidavit as simply conclusions and of no effect whatever in determining petitioner's actual status before the New York Court in the original action (R. 181, 184, 185), nevertheless, it held that these "conclusions",

made nine years later, were evidence establishing that when the petitioner filed his original action he knew that he was not the real party in interest under the reassignment of December 1, 1925. This line of reasoning cannot be followed.

The fact remains, and it is undisputed, that when petitioner originally filed his suit in New York he had the reassignment of December 1, 1925, duly executed and delivered in his possession (R. 68, 88, 184). Even if that instrument did not constitute the petitioner the real party in interest as a matter of law, it was such an instrument as would justify any layman in thinking that it did give him authority to institute the suit; and, therefore, failure to disclose any supposed information in the instrument would clearly not be fraudulent. To hold that because of statements made by petitioner nine years later, in a collateral proceeding, he therefore had interpreted an instrument to his disadvantage nine years before and concealed this interpretation from the court, is extending the probative value of such evidence beyond sound legal principles. The statements contained in the affidavit, when considered and interpreted in the light of the entire affidavit and in the light of the circumstances under which it was given, do not warrant any such extension of its probative value (*ante*, pp. 7-9).

There is a legal principle of universal recognition and acceptance that the fraud which may possibly render a judgment vulnerable to impeachment is "extrinsic" fraud as distinguished from "intrinsic" fraud, or, in other words, fraud collateral to the matter tried as distinguished from fraud connected with the merits of the controversy. In discussing what constitutes "extrinsic" fraud, this Court, in the leading case of *U. S.* v. *Throckmorton*, 98 U. S. 61, said at pages 65 and 66:

> "But there is an admitted exception to this general rule in cases where, by reason of something done by the

successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing. See Wells, Res Adjudicata, Section 499; *Pearce* v. *Olney*, 20 Conn. 544; *Wierich* v. *DeZoya*, 7 Ill. 385; *Kent* v. *Ricards*, 3 Md. Ch. 392; *Smith* v. *Lowry*, 1 Johns. (N. Y.) Ch. 320; *DeLouis et al.* v. *Meek, et al.*, 2 Iowa 55."

See also:

Wright v. *Saltmarsh*, 174 Oklahoma 226;
Jacobowitz v. *Herson*, 268 N. Y. 130, 133, 134.

The distinguishing character of "extrinsic" fraud is that it is that kind of fraud which prevents an adversary trial upon the issues. If a party has lost his case by false swearing, perjury, concealment, etc., all of which go to the merits of the controversy and the issue before the court and none of which prevents him from having an adversary trial on the merits, then he has his remedy by way of new trial, appeal, error, vacation, etc., but once the judgment has become final, it is conclusive upon him and cannot be collaterally attacked. The principle, although it may operate harshly in some instances, is a rule of necessity—the public necessity that there be some time an end to litigation. As has been

shown, heretofore, non-disclosure of lack of capacity to sue or that the petitioner is not a real party in interest does not constitute fraud under any definition, for the obvious reason that a party is not required to disclose to his adversary facts which would defeat his recovery. If such non-disclosure be accompanied by concealment or false swearing or perjury, it can rise only to the dignity of "intrinsic" fraud and furnishes no basis for a collateral attack upon the judgment.

Toole v. *Fite*, 57 Utah 1;
Borgos v. *Price*, 140 N. Y. Misc. Rep. 287;
Harrington v. *Denny*, 3 Fed. Supp. 584, 593, 594 (appeal dismissed 68 F. (2d) 1004);
Matter of Holden, 271 N. Y. 212.

It should be noted, moreover, that the term "extrinsic fraud" means *actual* fraud. It signifies a case where one knowingly and deliberately seeks to take undue advantage of another for the purpose of defrauding him; and this is true as well, in a case where the fraud consists of a concealment.

Freeman on Judgments, 5th Ed. page 2569;
Dockery v. *Central*, 45 Arizona, 434;
Ward v. *Southfield*, 102 N. Y. 287.

In this case there is absolutely no connection whatsoever between petitioner's arrangement to distribute the proceeds of suit and the respondent's obligation to return petitioner's 250 shares of stock and his obligation to account with respect to the moneys received by him during his possession thereof. What undue advantage was taken when petitioner obligated himself to make distribution of the proceeds of his claim to his wife and to creditors, retaining the right to any balance remaining thereafter? What fraud was perpetrated by this arrangement upon respondent—one who has no interest whatsoever in what petitioner seeks to accomplish with the

proceeds of his claim? If petitioner had assigned his claim to petitioner's brother and if petitioner's brother had reassigned it by simple instrument prior to petitioner's suit against respondent, then, certainly, it could not be contended that petitioner was under duty to reveal what had occurred to the New York court. This hypothetical illustration is, in effect, the instant case. The only difference is that the reassignment under review provides for certain beneficial interests—*a matter that does not concern the respondent.* The hypothetical illustration and the instant case are the same in that in both there is the complete assignment of legal title.

Petitioner proceeded under an instrument of reassignment which indicated to him that he had a perfect right to sue in his own name and it is inconceivable that any court would contend, that petitioner, a layman, armed with that instrument, intended to perpetrate a fraud upon the New York court.

Point VI.

The Findings, Conclusions and Judgments Rendered in the Courts of the State of Ohio are Contrary to the Evidence and Contrary to Law.

When the Court of Common Pleas and the Court of Appeals found and concluded that petitioner was not the real party in interest and that he perpetrated a fraud upon the New York court, the Ohio courts went, of necessity, behind the New York judgment, and in doing so they made findings completely interwoven with their denial of full faith and credit to the judgment recovered by petitioner in the courts of the State of New York. If, in a suit on a foreign judgment, a court inquires into defenses such as payment after judgment, general release or lack of capacity to sue by reason of assignment of the judgment, and the trial court

makes findings adverse to the judgment creditor, such findings are not in derogation of the constitutional safeguard. But if the trial court inquires into defenses existing prior to the rendition of the judgment, its findings, adverse to the judgment-creditor, are, of necessity, completely interwoven with its denial of full faith and credit. To find that petitioner was not the real party in interest under the Ohio law, the Ohio courts determined first that petitioner was not the real party in interest in the New York suit and that he perpetrated a fraud upon the New York courts. In making such determination, the Ohio courts went, automatically, behind the New York judgment conclusive, as to all matters which were actually determined and all matters which might have been litigated—including the defense of lack of capacity to sue.

This Court may properly review the findings upon which the Ohio courts determined that petitioner was not the real party in interest and that he perpetrated a fraud upon the New York courts because, as heretofore stated, the findings are completely interwoven with the denial of full faith and credit to petitioner's judgment recovered in the State of New York.

Fiske v. *Kansas*, 274 U. S. 380, 385;
Kansas City So. Rwy. v. *Albers Comm. Co.*, 223 U. S. 573, 591.

The Court of Common Pleas, disregarding the binding reassignment, predicated its findings upon statements contained in petitioner's affidavit of August 17, 1934, but when those statements are properly considered and interpreted, they do not warrant the interpretation that petitioner perpetrated a fraud upon the Supreme Court of the State of New York. As was found by the Court of Appeals, the affidavit was directed specifically to occurrences on and a status as of November 23, 1925. London I. Wallick was not seek-

ing to enjoin petitioner's interest in the judgment obtained against respondent. He was seeking, rather, to enjoin the disposition of *all* of the proceeds of the judgment (R. 137, 138). In opposing the motion for the completely comprehensive, temporary injunction, petitioner was entitled to every possible and proper legal objection. With certainty, London I. Wallick was not entitled to the temporary injunction because he knew of the prior assignment made by petitioner to his brother on March 31, 1924 (R. 95-101, 141). London I. Wallick was not entitled to more than the alleged contract itself contemplated, that is, an interest subject to a known prior assignment. Specifically, whatever occurred after November 23, 1925, did not concern London I. Wallick and as far as he was concerned, petitioner was entitled to assert such facts as would reveal to the Supreme Court of the State of New York that London I. Wallick, based upon his alleged contract of November 23, 1925, was not entitled to the unusual remedy of an injunction. It is also noteworthy that when petitioner commenced his action in New York he was the possessor of the reassignment of December 1, 1925, which had been duly executed and delivered to him. *In addition, both the Court of Appeals and the Court of Common Pleas disregarded the fact that respondent possessed knowledge in March 1929 of the prior assignment made by petitioner (both from Gentsch's affidavit and from petitioner's cross-examination at the second trial) and that respondent made no effort to amend his pleading for the purpose of setting forth any defense with respect thereto.* (R. 119, 120, 95-101, 190).

Proper interpretation of the affidavit of August 17, 1934, that is to say, *as the Court of Appeals said*, that it applied to a status as of November 23, 1925, when coupled with respondent's knowledge of facts sufficient to enable him to plead, in the Supreme Court of the State of New York, a

defense of lack of capacity to sue and when coupled with the further fact that when petitioner commenced his New York action he was in possession of a duly executed and delivered instrument of reassignment, destroys completely any finding or inference of fraud perpetrated upon the New York courts. The circumstances referred to—(1) proper interpretation of the affidavit, (2) respondent's knowledge of the assignment and (3) petitioner's possession of a duly executed and delivered instrument of reassignment—when linked together with the abundance of authority on the point that the instrument of reassignment was quite sufficient to transfer both legal and beneficial ownership to petitioner, lead to the single inference that the Ohio adjudication—that petitioner was not the real party in interest and that he perpetrated a fraud—is contrary to the evidence and contrary to law.

Conclusion.

For the foregoing reasons it is respectfully submitted that the judgment of the Supreme Court of the State of Ohio and the judgments of the Court of Appeals of Franklin County, Ohio and of the Court of Common Pleas of Franklin County, Ohio, should be reversed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 188

EDWARD H. TITUS,

Petitioner,

vs.

LOU C. WALLICK.

PETITIONER'S REPLY BRIEF.

Answering Respondent's First and Second Propositions.

A careful reading of respondent's brief reveals that it is built around a half-hearted assertion that the Ohio trial court found that petitioner was not the real party in interest under the law of the forum and that the Ohio judgment is based, therefore, upon an independent ground of State procedure. Respondent seeks to invoke the principle that where an appellate process brings a judgment of a State court before the Supreme Court for review, this Court will inquire whether the judgment of the State court was based upon a non-Federal ground adequate to support it.

The foregoing principle has been applied to prevent consideration of Federal rights where the ruling of the State court was based on such independent grounds as a volun-

tary payment of taxes, *res judicata*, laches and the statute of limitations.

Gaar, Scott & Co. v. *Shannon*, 223 U. S. 468;
Northern Pacific Railroad Co. v. *Ellis*, 144 U. S. 458;
Moran v. *Horsky*, 178 U. S. 205;
Rector v. *Ashley*, 6 Wall. 142.

It is conceivable that the principle would be accorded recognition where suit on a foreign judgment is defended on the ground of payment after judgment, general release after judgment or lack of capacity to sue by reason of assignment of the judgment and the defense is deemed by the trial court to have been established.

It is noteworthy, however, that the adjudicated cases and the aforementioned illustrations involve non-Federal questions unconnected with a recognized and uncontradicted Federal right. To assert that the judgment creditor may not recover on his judgment in a foreign State because he assigned the judgment after the recovery thereof is not violative of the full faith and credit clause. But to assert that the judgment creditor cannot proceed in another State on the foreign judgment itself by reason of defenses (alleged or real) existing *prior* to its rendition, involves, directly so, *disregarding constitutional safeguards*. That is exactly the instant case.

To find that petitioner was not the real party in interest under the Ohio law, the Ohio courts determined first, that petitioner was not the real party in interest in the New York suit and that he perpetrated a fraud upon the New York courts. In making such determination, the Ohio courts went, of necessity, behind the New York judgment, conclusive as to all matters which were actually determined and all matters which might have been litigated—including the defense of lack of capacity to sue.

In other words, the so-called non-Federal ground, relied upon by respondent, is not a ground independent of the judgment itself, and, therefore, this Court may properly give consideration to the Federal right involved. Any other view of the situation would mean that "a non-Federal ground" could be used as a pretext or cloak to evade a decision of a Federal question, and constitutional safeguards might be so warped by State courts as to become "sound and fury, signifying nothing".

The foregoing is not mere theorization. It is simply an oft-repeated and well-established amplification of the rule that the Supreme Court will not assume jurisdiction where a State court based its judgment on a non-Federal ground *adequate to support it.* True amplification of the general principle comprehends three factors: (1) the non-Federal ground must be broad enough to sustain the judgment; (2) it must be independent, that is, *not so interwoven with the Federal question as to be inescapable of separate treatment and determination;* and (3) *a non-Federal ground, plainly untenable, will not defeat review.*

Robertson and Kirkham on "Jurisdiction of the Supreme Court of the United States", pages 156-158;
Creswill v. *Grand Lodge Knights of Pythias of Georgia*, 225 U. S. 246, 261;
Enterprise Irrig. Dist. v. *Canal Co.*, 243 U. S. 157, 163-165;
Ward et al. v. *Love County*, 253 U. S. 17, 22;
Davis v. *Wechsler*, 263 U. S. 22, 24;
Moran v. *Horsky*, 178 U. S. 205.

In *Gear, Scott & Co.* v. *Shannon, supra*, relied upon by the respondent, the principle is expressed in the following language on page 471:

"It is, however, equally well settled that if the Federal question is properly presented and necessarily con-

trols the determination of the case, the appellate jurisdiction of this court is not defeated because the decision is put upon some matter of local law. West Chicago R. R. Co. v. Chicago, 201 U. S. 506, 520."

Not only is it clear that the Ohio courts disregarded the full faith and credit clause when they went behind the New York judgment to find that petitioner was not the real party in interest—a ground dependent upon and interwoven with the Federal question—but it is also clear that the non-Federal ground is plainly untenable in view of the abundance of authority on the point that the instrument of reassignment (R. 83-85, 85-88; Petitioner's Exhibits D, E) constituted petitioner the real party in interest. (See Petitioner's Point III.) The latter disposes, as well, of respondent's reliance on the doctrine expressed in *Klinger* v. *Missouri*, 13 Wall. 257, that where it does not appear upon which of two grounds the decision was based, whether the Federal or non-Federal ground, then this Honorable Court will refuse to review only if the non-Federal ground (assuming it is independent) is *"a good and valid one"*.

Respondent's contention that it does not appear that the Ohio courts dealt with any Federal question was fully discussed in the petition for writ of certiorari herein; and on pages 17, 18, 22 and 23 thereof complete answer is made to respondent's argument.

Respondent relies upon the procedural statute of Ohio which provides that an action must be prosecuted in the name of the real party in interest. What he overlooks is that if suit were brought in Ohio on the original cause of action a procedural statute in Ohio would apply; but in the instant case suit was brought on a judgment which is already in the name of petitioner, that is to say, petitioner has legal title to the judgment; and, therefore, with respect to the judgment, petitioner is the real party in interest in

Ohio. The procedural statute in Ohio cannot possibly be applied to the original cause of action upon which suit was commenced in New York and not in Ohio.

Respondent's second proposition, which implies that this Court will not review the findings upon which the Ohio courts determined that petitioner was not the real party in interest and that he perpetrated a fraud upon the New York courts, overlooks the point that the findings are completely interwoven with the denial of full faith and credit to petitioner's judgment (see Point VI of petitioner's main brief.)

Answering Respondent's Third Proposition.

On page 28 of respondent's brief, it is stated that *Banca v. Clarkson*, 274 N. Y. 69, "is not helpful for the reason that the facts and circumstances of the agreement before the court do not appear from the reported opinion". Page 74 of the *Clarkson* opinion indicates, however, the absolute simplicity of the arrangement made between the surety company and the plaintiff, who suffered the loss which was made good by the surety company. An examination of the record on appeal will indicate that there was no formal trust. *The agreement was fully set forth in the opinion.*

Brown v. *Ginn*, 66 O. S. 316, is referred to by the respondent on page 28 of his brief, but that authority is wholly inapplicable herein. In that case the assignment of a claim was made to an attorney and the attorney's fee was to be paid from the proceeds of suit. Unlike the instant case, the attorney had no beneficial interest whatsoever except to the extent of his fee and the expenses advanced by him—an interest that was purely contingent in character. No comparison whatsoever can be made between the contingent interest of the attorney in *Brown* v. *Ginn* and the actual beneficial interest of petitioner in the case under review. *Brown v. Ginn* involved an assignment to an attorney with com-

pensation to the attorney depending entirely upon his success in enforcing the obligation. The case relates, therefore, to a transaction champertous in nature—a factor recognized in *Stricks v. Siegel*, 135 N. Y. Misc. Rep. 60, affirmed as modified 188 N. Y. Misc. Rep. 266.

Respondent attempts to make capital of the point that under the Ohio Code, equitable defenses may be interposed in an answer and that, therefore, respondent's procedure in Ohio constituted a direct attack upon the New York judgment. *The fact remains, however, that respondent's answer, interposed in the Ohio suit, did not seek to vacate the judgment recovered by petitioner in the State of New York and that the judgment in the Ohio suit did not set aside the New York judgment.* New York State is also a State in which distinctions between law and equity have been abolished. Section 8 of the Civil Practice Act of the State of New York mentions that there is only one type of civil action, but in actual practice careful distinctions are still drawn between actions at law and proceedings in equity.

E.T.C. Corporation v. Title Guarantee & Trust Company, 271 N. Y. 124.

Respondent did not seek by way of his answer to obtain equitable relief and, therefore, he is precluded from claiming that his attack upon the judgment was other than a collateral one.

Phillips v. Griffin, 236 N. Y. App. Div. 209, 211, states clearly, despite the fact that the State of New York has eliminated the distinction between equity and law, that to attack a judgment for fraud, suit must be had in equity.

On page 32 of respondent's brief, reference is made to *Dobson v. Pearce*, 12 N. Y. 156. The decision in that case was based upon the theory that when the action was brought in Connecticut upon the New York judgment, the

defendant filed a bill against the plaintiff on the equity side of the court. That procedure constituted a direct attack upon the judgment. All that the respondent did in the instant case (R. 40, 41) was to set up his affirmative defense and "the defendant prays that he may go hence without day and have his costs herein".

Page 42 of respondent's brief states that *Armstrong* v. *Armstrong*, 117 O. S. 556, was cited by petitioner. Petitioner's brief, however, makes no mention of that authority. It is cited on a general point in petitioner's brief in support of the petition for certiorari.

On page 39 of respondent's brief, attempt is made to minimize the applicability of *Matter of Holden*, 271 N. Y. 212. The *Holden* case is relied upon by petitioner as being conclusive upon the point that petitioner's judgment would not be impeached in New York (see page 18 of petitioner's brief). Respondent's discussion of this case would make it appear that the assignee perpetrated a fraud upon the assignor and that the assignee then made an assignment to another assignee with the result that the fraud related to a purely remote transaction. Unfortunately, the opinion in the case does not set forth the facts with completeness, but when recourse is had to the record on appeal in the case, it is apparent that *Matter of Holden* is adequate authority. In that case, one Hennenlotter, obtained an assignment of a condemnation award by fraud. He took the assignment in the name of an admitted "dummy", one Barbara Nelson, his sister-in-law. Based upon the assignment the Appellate Division made an order granting the right to Nelson to receive payment of the award; and after payment was made the assignors then started the proceeding to vacate the Appellate Division order. That proceeding was brought against Hennenlotter and his attorney. Barbara Nelson was named as a respondent but she took no part in the defense—and that was quite consistent with

her role of "dummy". The Court of Appeals' opinion refers to Hennenlotter as Nelson's assignor, but it is apparent that that description is not correct because the original owners were the assignors and Hennenlotter was the assignee through his "dummy" Nelson. The original owner of the condemnation award claimed that because the assignment was procured by fraud, the prior proceeding to withdraw the proceeds of the award constituted a fraud upon the court. In other words, the real claim was that since Hennenlotter knew that he obtained the assignment by fraud, he knew that he had no right to sue for the proceeds and that in suing therefor (through his "dummy" Nelson) he perpetrated a fraud upon the court. The Appellate Division vacated the order awarding payment and directed Hennenlotter to redeposit the money which he had received; but the Court of Appeals reversed the order and dismissed the proceeding. *In summary, the Court of Appeals held that knowledge by an assignee of the fact that his assignment is vulnerable by reason of fraud in the obtaining thereof and that he had no right to sue is not sufficient to constitute a fraud upon the court.*

Respondent relies (p. 41) upon *Ward* v. *Southfield*, 102 N. Y. 287, to show that a judgment may be attacked collaterally because of fraud. It is noteworthy, however, that *Ward* v. *Southfield* constituted a direct attack upon a judgment and that the excerpt from the opinion (page 293) relied upon by respondent is *dictum*, unsupported by any authority which links, improperly so, collateral attack with vacating a judgment.

Respondent relies (pages 43-46) upon a number of cases, decided in the courts of various States, to show that fraud may be utilized for the purpose of attacking a judgment. It is fair to state, however, that those authorities may be classified in the following manner:

(1) A number of the cases involve fraud in obtaining jurisdiction.

Cohen v. *Bromberg*, 170 N. W. 478;
Mendlowitz v. *Shoe Company*, 5 S. W. (2d) 559;
Hare v. *Reily*, 269 S. W. 473;
Morris v. *Morris*, 269 N. Y. S. 636;
Lorrick v. *Walter*, 29 O. A. 363;
Capper v. *Short*, 11 S. W. (2d) 717.

(2) Other opinions uphold a judgment and go on to state that the judgment is not conclusive if fraud is established, but they do not indicate whether they mean thereby that the fraud shall be utilized in a direct attack or that it may be utilized by way of collateral attack.

Lamb v. *Stock Co.*, 132 Fed. 434;
Webb v. *Friedberg*, 126 S. E. 506;
White v. *Minder*, 148 Atl. 781;
Franklin v. *Lee*, 253 N. Y. S. 620;
Ring v. *Whiteman*, 140 S. E. 150.

(3) A number of cases relate to instances in which no adversary trial was had.

Cohen v. *Bromberg*, 170 N. W. 478;
Hare v. *Reily*, 269 S. W. 473;
Schendel v. *Ry. Co.*, 210 N. W. 70;
Dyer v. *Johnson*, 19 S. W. (2d) 421.

(4) At least one authority cited by the respondent was impliedly repudiated eleven years later by the same court.

Schendel v. *Ry. Co.* (Minn. 1926) 210 N. W. 70, repudiated by *Melgaard* case, 200 Minn. 473.

On page 30 of the respondent's brief, respondent attempts to criticise the general principle that parties to an

action, as distinguished from third parties, may not attack a judgment collaterally for fraud, except possibly such fraud which goes to the question of jurisdiction. He contends that the principle applies to domestic judgments. It is submitted, however, that the principle applies as well to foreign judgments. All that *Freeman*, 5th Edition, Section 1401, states is that some jurisdictions have applied a different rule in the case of foreign judgments. *It is significant that respondent fails to give the full quotation from Freeman, Section 1401.* The following sets forth the full excerpt and everything contained therein is quite in accord with the principle as it has been described by petitioner:

> "Notwithstanding the contrary rule as applied to domestic judgments, many cases either hold or contain *dicta* to the effect that sister state and foreign judgments may be attacked collaterally for fraud. Whenever the fraud is of such a nature as to directly affect the jurisdiction of the court, there is doubtless a sound basis for such a rule, since such a case does not differ materially from any other in which a lack of jurisdiction may be shown, though it is not entirely clear as to what sort of frauds may be sufficient to prevent the acquirement of jurisdiction. But in view of the requirement that a sister state judgment shall be given the same effect as it has where rendered, the question whether it is collaterally impeachable for fraud, except where the matter is jurisdictional, ought to depend entirely upon whether such an attack may be made in the state of its rendition; and this is what some of the cases hold. If it is impeachable there for fraud, it is to some extent impeachable elsewhere. *However, as we have elsewhere shown, the rule is almost if not quite universal, that a judgment cannot be collaterally attacked on this ground in the state where it was rendered, except by persons who were not parties or privy to it but against whom it would otherwise be conclusive on the theory of representation or contractual obligation. It is doubtless for this reason that some courts*

has laid down the rule broadly that judgments from other states cannot be collaterally impeached for fraud, some of them going to the extent of saying that relief on this ground must be sought in the courts of the other state, in some direct proceeding for that purpose.'' (Italics ours.)

Conclusion.

The mere enumeration of the following matters raised in petitioner's main brief, which respondent has avoided answering, bespeaks tacit admission on respondent's part of petitioner's right to relief herein:

1. Respondent has carefully avoided denial of the fact that an adversary trial was had.

2. Respondent has refrained from ascertaining the factual basis of the *Clarkson* case, 274 N. Y. 69 (petitioner's brief page 23), pursuant to which petitioner was at least a trustee, capable of bringing suit; and he has refrained from a discussion of the case on the merits.

3. Respondent has ignored the historic significance of the "attorney-in-fact" clause in the reassignment (petitioner's brief, page 24).

4. He has disregarded the fact that petitioner is fully capable of granting him complete discharge from his indebtedness and that petitioner has a definite beneficial interest by reason of the payment of his debts and his right to the remainder (petitioner's Point III).

5. He has avoided the charge that a refusal to grant petitioner relief herein would permit respondent to profit from a fraud *proved by documentary evidence* (petitioner's brief, page 4).

6. Just as respondent would have had the burden of establishing the defense of payment, release, statute of limitations or assignment of judgment, so he had the burden of

proving that petitioner's judgment was impeachable by extrinsic fraud in New York if petitioner was not the real party in interest; and this burden respondent did not meet (petitioner's brief, page 17). Respondent makes the ridiculous attempt (respondent's brief, page 37) to assert that the New York courts have held that an alleged partial assignment of petitioner's claim to London I. Walliek constituted a fraud upon the court, when all that occurred was that a new trial was granted so that a trial court could weigh the testimony of London I. Walliek in the light of his alleged claim. This was so stated by Mr. Justice Valente when he granted the motion for a new trial (R. 105, 106).

7. Respondent has failed to disprove the fact that he possessed knowledge in March 1929 of petitioner's prior assignment and that he failed to interpose an appropriate defense in the New York action (petitioner's brief, pages 10, 35).

Respectfully submitted,

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Attorneys and Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 188

EDWARD H. TITUS,

Petitioner,

vs.

LOU C. WALLICK.

PETITIONER'S SUPPLEMENTAL BRIEF REPLYING TO SUPPLEMENTAL BRIEF OF RESPONDENT RE INDEPENDENT NON-FEDERAL GROUND ADEQUATE TO SUPPORT JUDGMENT BELOW.

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PETITIONER'S SUPPLEMENTAL BRIEF REPLYING TO SUPPLEMENTAL BRIEF OF RESPONDENT RE INDEPENDENT NON-FEDERAL GROUND ADEQUATE TO SUPPORT JUDGMENT BELOW.

Respondent's principal contention is that no relief will be granted in this Court if the judgment of a State court is based upon a non-Federal ground adequate to support it. It is claimed that the Ohio courts have held that petitioner was not the real party in interest in Ohio.

To apply the principle upon which respondent relies the non-Federal ground must be (1) broad enough to sustain the judgment; (2) it must be independent, that is, not so interwoven with the Federal question as to be inescapable of separate treatment and determination; and (3) if the non-Federal ground is plainly untenable, it will not defeat

review. (See petitioner's main brief, pages 33, 34; and petitioner's reply brief, pages 2-5.)

How does respondent's present contention meet the prescribed test?

To find that petitioner was not the real party in interest in Ohio, the Ohio courts first decided that petitioner was not the real party in interest in the New York suit and that he perpetrated a fraud upon the New York courts. In making such determination, the Ohio courts went, of necessity, behind the New York judgment, conclusive as to all matters which were actually determined and all matters which might have been litigated—including the defense of lack of capacity to sue. It follows, therefore, that the so-called non-Federal ground, referred to by respondent, is not a ground independent of the judgment itself and this Court may properly give consideration to the Federal right involved.

It is no answer to say that the decision in Ohio rested on the independent ground that petitioner was not the real party in interest in Ohio under that State's procedural statute *because the decision did not in fact rest upon that ground.* An examination of the opinions and decision rendered in the Ohio courts bears out this statement.

The Court of Appeals said (R. 181), in referring to the reassignment of December 1st, 1925, that:

> "If the rights of the parties are fixed by the instrument termed 'Article of Agreement' and Walter Titus transferred any such legal or equitable interest or both in his claim to the plaintiff as would entitle him to maintain an action in his own name in New York, *then he was a proper party in interest there and a proper party in interest here.* This is true without respect to the assertions of fact made in the affidavit of plaintiff in the injunction proceeding in New York, because the plaintiff, though he may have misinterpreted the import of the agreement, could not change its effect in law." (Italics ours.)

The Court of Appeals also stated (R. 185) with regard to the reassignment:

> *"The article of agreement having been executed subsequent to November 23, 1925, and before suit would support the right of plaintiff to institute his suit in New York if it clothed him with authority so to do.* But the effect of the article of agreement was not to be determined by a finding of fact but by judicial construction as a matter of law. At law it bears but one construction and that is against the claim of the plaintiff that he was the real party in interest in the action *in New York.*" (Italics ours.)

From the foregoing it is apparent that the Ohio Court of Appeals made no attempt to apply the Ohio procedural statute. That court realized that the Ohio courts could not apply the Ohio procedural statute to a suit on a New York judgment if the assignee could maintain suit, in New York, under the assignment of the original cause of action. The Court of Appeals applied what *it thought* to be the New York law to the reassignment made prior to judgment.

When the Court of Appeals stated that the petitioner was not the real party in interest in Ohio the statement was linked up directly with the point that petitioner was not the real party in interest *in New York* (R. 180; 186). In holding that the reassignment was ineffective, the Court of Appeals cited two New York authorities (R. 183; 184), both of which that court misconstrued. (See petitioner's main brief, page 26.)

In other words, the Court of Appeals *did* go behind the New York judgment. In deciding the question as to whether petitioner could bring suit in New York under the reassignment, it decided a question interwoven with the Federal right.

The trial court likewise failed to make its decision on the basis of the Ohio procedural statute. The trial court found as a fact (R. 172):

> "9. That at the institution of the suit in which the plaintiff recovered said judgment, and at all times during the litigation of said suit, the plaintiff was not the real party in interest and did not own or have any interest in the alleged claim against the defendant therein sued upon and plaintiff in and during said litigation suppressed and concealed that fact from the court and from the defendant."

This finding of fact that petitioner was not the real party in interest in the New York suit was then followed with a *conclusion of law—not a finding of fact*—that (R. 173):

> "3. The court finds as a conclusion of law that the plaintiff herein is not the real party in interest in this action and has no right to maintain this action in his name."

It is clear that the conclusion of law was based upon the finding of fact *which did go behind the New York judgment:* and the latter conclusion of law was, therefore, followed by further conclusions that petitioner's judgment was procured in the courts of New York through fraud practiced upon the New York courts, because petitioner was not the real party in interest in the New York suit, and that by reason thereof "the said judgment so obtained in the State of New York was and is impeachable there for fraud and it was and is to the same extent impeachable in the courts of Ohio" (R. 173).

It is significant that the trial court's opinion disregarded the reassignment, whether under the New York law or under the Ohio law—refusing to decide whether the reassignment constituted petitioner the real party in interest "under the statutes of New York or of Ohio or both" (R. 155)—and

that it is aimed entirely at the question of fraud on the New York courts as a means of assailing the judgment; which in turn is, naturally, predicated on petitioner's alleged inability to maintain suit under the New York law. The trial court disregarded the Ohio procedural statute and dealt with a possible qualification of the constitutional right which attaches by reason of the full faith and credit clause.

If further proof is necessary of the fact that the trial court regarded the question before it as interwoven with the Federal right, one need only refer to the trial court's opinion in so far as it "*considered together*" the affirmative defense that petitioner was not the real party in interest in Ohio and the affirmative defense that the judgment in the State of New York was procured through fraud practiced upon the court because petitioner was not the real party in interest in that suit (R. 149).

In summary, it is apparent that the trial court dealt with the case as one which involved a constitutional question. It found *as a fact* that petitioner was not the real party in interest in New York; it then *concluded* that he was not the real party in interest in Ohio and it *concluded*, further, that the New York judgment was impeachable in Ohio. The Ohio courts did not deal with the real party in interest question as an independent procedural question. If the Ohio courts had dealt with it in that manner, then they would have indicated that the New York judgment should be respected and they would have referred to some other person as the proper party to maintain suit in Ohio on the judgment. But if the Ohio courts had indicated that conclusion, then they would have had to recognize petitioner's right to maintain suit on the judgment in Ohio because, on constitutional principles, the right to maintain suit was fixed as of a time prior to recovery of judgment and a judgment-creditor is protected under the full faith and credit clause of the Constitution.

The Ohio courts *must* recognize the right of an assignee of a cause of action to sue in Ohio on a judgment procured in New York if the assignee had the right to bring suit on the original cause of action in New York, because the validity and effect of an assignment is determined by the law of the place where the assignment is made and the right of an assignee to bring suit in his own name is determined by the law of the place where the original cause of action is brought.

Williston on Contracts, Revised Edition, pp. 1296;
Barbin v. *Moore*, 85 N. H. 362;
People v. *Ladew*, 237 N. Y. 413, 438;
Levenbaum v. *Hanover*, 253 Mass. 19, 24;
Dixon v. *Paul*, 167 Fed. 784.

The Ohio courts cannot, therefore, apply a procedural Ohio statute to make a New York judgment a nullity. To say that the Ohio courts applied a procedural statute *only* is to do just that. To say that one may recover on a cause of action in New York but that he may not recover in Ohio on the judgment is to strike at constitutional safeguards.

It is submitted, moreover, that the so-called independent ground relied upon by respondent is plainly untenable. Petitioner has a definite *beneficial* interest in the proceeds of the judgment under the instrument of reassignment (R. 85, 87) and, therefore, he is the real party in interest under the Ohio laws—a fact recognized by the Court of Appeals when it stated (R. 181) that if the reassignment transferred to plaintiff a "legal or *equitable* interest" in the claim as would entitle him "to maintain an action in his own name in New York, then he was a proper party in interest there and a proper party in interest here". In addition, petitioner was the real party in interest under the reassignment, as is established by the abundance of authority on the point (Point III of petitioner's main brief), that is, by the

law of the State under which the validity and effect of the reassignment should be determined.

The legal insufficiency of the ground relied upon by respondent is fully established by the following quotation from *Milwaukee County* v. *White Co.*, 296 U. S. 268, 276:

> "We can perceive no greater possibility of embarrassment in litigating the validity of a judgment for taxes and enforcing it than any other for the payment of money. The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin. *That purpose ought not lightly to be set aside out of deference to a local policy which, if it exists, would seem to be too trivial to merit serious consideration when weighed against the policy of the constitutional provision and the interest of the state whose judgment is challenged.* In the circumstances here disclosed no state can be said to have a legitimate policy against payment of its neighbor's taxes, the obligation of which has been judicially established by courts to whose judgments in practically every other instance it must give full faith and credit. Compare *Fauntleroy* v. *Lum*, *supra*.
>
> In numerous cases this Court has held that credit must be given to the judgment of another state although the forum would not be required to entertain the suit on which the judgment was founded; *that considerations of policy of the forum which would defeat a suit upon the original cause of action are not involved in a suit upon the judgment and are insufficient to defeat it.* Full faith and credit is required to be given to the judgment of another state although the original suit on which it was based arose in the state of the forum and was barred there by the Statute of Limitations when the judgment was rendered; *Christmas* v. *Russell*, 5 Wall.

290; *Roche* v. *McDonald*, 275 U. S. 449; and where the original suit was upon a gambling contract invalid by the law of the forum where it was made: *Fauntleroy* v. *Lum*, *supra*. It was required where the judgment was for wrongful death, although it was thought that the statute giving the recovery was not entitled to full faith and credit. *Kenney* v. *Supreme Lodge*, *supra*; compare *Converse* v. *Hamilton*, *supra*; *Broderick* v. *Rosner*, *supra*; see also *American Express Co.* v. *Mullins*, 212 U. S. 311." (Italics ours.)

In *Kansas City So. Ry.* v. *Albers*, 223 U. S. 573, at page 593, this Court referred to its power to review findings as follows:

"A like exercise of this power is shown in cases arising under the clause of the Constitution requiring full faith and credit to be given in each State to the Judicial proceedings of every other State. *Huntington* v. *Attrill*, 146 U. S. 657, 684, was such a case. It was a suit in Maryland upon a judgment obtained in New York under a statute of the latter State imposing a liability for the debts of a corporation upon a director making a false certificate respecting its condition. The Court of Appeals of Maryland held that the judgment was for a strictly penal liability and therefore not within the protection of the full faith and credit clause. But when the case came here it was held that '*if the state court declines to give full faith and credit to a judgment of another State, because of its opinion as to the nature of the cause of action on which the judgment was recovered, this court, in determining whether full faith and credit have been given to that judgment, must decide for itself the nature of the original liability.*' And upon reaching the conclusion that in that instance the original liability was not strictly penal this court reversed the judgment of the Court of Appeals of Maryland." (Italics ours.)

Kenney v. *Supreme Lodge*, 252 U. S. 411, involved an action of debt brought in Illinois upon a judgment recovered

in Alabama. The defendant claimed that a statute in Illinois provided that no action should be brought or prosecuted in Illinois for damages occasioned by death occurring in another State in consequence of wrongful conduct. The judgment in Alabama was based upon an action for wrongful death. The Supreme Court of Illinois held that since the original action could not have been brought in Illinois, the Illinois courts had no jurisdiction of a suit on the judgment. In reversing the judgment which affirmed the quashing of plaintiff's demurrer this Court stated the following on page 415:

> "In *Fauntleroy* v. *Lum*, 210 U. S. 230, it was held that the courts of Mississippi were bound to enforce a judgment rendered in Missouri upon a cause of action arising in Mississippi and illegal and void there. The policy of Mississippi was more actively contravened in that case than the policy of Illinois is in this. Therefore the fact that here the original cause of action could not have been maintained in Illinois is not an answer to a suit upon the judgment. See *Christmas* v. *Russell*, 5 Wall. 290; *Converse* v. *Hamilton*, 224 U. S. 243. *But this being true, it is plain that a State cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to courts otherwise competent.* The assumption that it could not do so was the basis of the decision in *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 111, 112, and the same principle was foreshadowed in *General Oil Co.* v. *Crain*, 209 U. S. 211, 216, 220, 228, and in *Fauntleroy* v. *Lum*, 210 U. S. 230, 235, 236. See *Keyser* v. *Lowell*, 117 Fed. Rep. 400; *Chambers* v. *Baltimore & Ohio R. R. Co.*, 207 U. S. 142, 148, and cases cited. Whether the Illinois statute should be construed as the Mississippi act was construed in *Fauntleroy* v. *Lum* was for the Supreme Court of the State to decide, but read as that court read it, it attempted to achieve a result that the Constitution of the United States forbad.

> Some argument was based upon the fact that the statute of Alabama allowed an action to be maintained in a court of competent jurisdiction within the State 'and not elsewhere.' But when the cause of action is created the invalidity of attempts to limit the jurisdiction of other States to enforce it has been established by the decisions of this court; *Tennessee Coal, Iron & R. R. Co.* v. *George*, 233 U. S. 354; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Sowers*, 213 U. S. 55; and had these decision been otherwise they would not have imported that a judgment rendered exactly as required by the Alabama statute was not to have the respect due to other judgments of a sister State." (Italics ours.)

The authorities cited by respondent that this Court will not review findings of fact concurred in by trial and appellate courts show, distinctly so, the limitation of that rule where clear error appears.

It is significant also that respondent's supplemental brief fails to take cognizance of the distinction between a suit on a judgment and a suit upon the original cause of action. He cites no case wherein procedural matter was utilized for the purpose of attacking and nullifying the judgment of a sister State.

Newman v. *Gates*, 204 U. S. 89 (respondent's supplemental brief, page 12) is not applicable herein because the appellate court made no attempt to pass upon a foreign judgment. Its ruling made provision so that full faith and credit could be given to a foreign judgment after appellate procedure was clarified. The appellate court disposed, merely, of a preliminary question and this Court held that it had no power to review because, in effect, no appeal was taken to the highest State court and there was, therefore, no final judgment or decree upon which review could be predicated. *In the instant case there is a final judgment.* Respondent's argument, based upon the *Newman* case—that there is no distinction between the inability of this Court

to consider an alleged Federal question not ruled on by the higher State court because the case was not properly before it "and the present situation wherein the case was never properly in the state courts at all"—is both inapplicable and fallacious. In the instant case, jurisdiction of the parties and subject matter was acquired by the Ohio court and, therefore, the case was properly in the State court. Respondent makes the futile attempt to create an analogy between an appellate court's refusal to hear the case on the merits because of procedural omission, which is, in effect, lack of appellate jurisdiction, and a situation wherein the trial court acquired full jurisdiction and proceeded to deny relief after a trial on the merits.

It is submitted that in view of the foregoing, the conclusion must follow that there was no decision in either Ohio court based upon an independent non-Federal ground, adequate to support it.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 188.

EDWARD H. TITUS,
Petitioner,

vs.

LOU C. WALLICK,
Respondent.

ANSWER BRIEF OF LOU C. WALLICK, RESPONDENT, OPPOSING PETITION FOR WRIT OF CERTIORARI AND MOTION TO PRINT ABBREVIATED RECORD.

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STATEMENT OF CASE.

We have examined the brief of petitioner, plaintiff below. We cannot agree with a number of the conclusions drawn to which counsel refer as facts. Hence, we

feel impelled to set forth a brief history of this litigation and the issues and facts involved as we understand them. Bold-faced type is ours excepting where otherwise noted.

The Pleadings and the Trial in the Court Below.

The issues are joined on the petition, amended answer, amendment to amended answer and the reply to the amended answer.

The petition sets forth a judgment of three hundred eighty-nine thousand one hundred three dollars and twenty-one cents ($389,103.21) alleged to have been recovered in the Supreme Court of New York county, state of New York. An exemplified copy of the judgment is annexed to the petition.

The amended answer of the defendant sets up defenses as follows:

1. The judgment in the New York proceedings is not responsive to the issues tendered by the pleadings.

2. The plaintiff in the action at bar, in Franklin county, Ohio, is not the real party in interest.

3. The judgment in the New York proceeding was procured through fraud practiced upon the New York court and upon the defendant, in that the plaintiff was at no time, from the very institution of the suit, the real party in interest and surreptitiously suppressed that fact.

4. A general denial.

The amendment to the amended answer pleads the New York real party in interest statute, which was in force at the time of the institution of the proceeding in New York and has continued in force since that time.

The reply admits the allegations of the amendment to e amended answer and alleges that all matters set up the amended answer were adjudicated in the New ork proceeding.

The cause came on for trial in the Court of Common eas, Franklin county, Ohio (Columbus), before Hon- able Charles A. Leach, January 20, 1936. A jury was aived with consent of the court. The evidence offered the triai consisted entirely of documentary evidence. t the trial the plaintiff asked permission to take deposi- ons in New York to prove delivery of Plaintiff's Ex- bit D, and permission to take such deposition was anted.

The opinion of Judge Leach of the trial court was an- unced April 21, 1936. Thereafter, the plaintiff filed a otion requesting the court to state in writing the con- usions of fact found separately from the conclusions law. The court complying with that request, found at the issues raised by the first defense (that the judg- ent in New York was not responsive to the issues) uld not be relitigated; **that the plaintiff was not the al party in interest in the action at bar and had no ght to maintain this action in Ohio in his name**; and at the plaintiff practiced a fraud upon the New York urts and upon the defendant (the respondent at bar) the procurement of the judgment and therefore the dgment is impeachable in this action. Copy of the al court's conclusions of fact and law are annexed to is brief.

History of the New York Case.

The New York case was instituted December 22, 1925, by the filing of a complaint and the issuing of summons.

The plaintiff primarily was claiming the ownership of two hundred and fifty shares (250) shares of the common stock of The Secor Hotel Company, of Toledo, Ohio, an Ohio corporation, which two hundred and fifty (250) shares represented a one-fourth (¼) interest in the company and which two hundred and fifty (250) shares plaintiff claimed he owned by virtue of an oral promise made in 1906, nineteen (19) years before the suit was brought. The plaintiff in addition to his claim for the recovery of said shares included grounds for relief in the way of **an accounting against the defendant for dividends or other sums** received by the defendant **to which the plaintiff was entitled** by reason of his ownership of said shares.

The first trial before Justice Proskauer resulted in a dismissal of the plaintiff's complaint.

The plaintiff then appealed to the Appellate Division. The Appellate Division on the inanimate printed record proceeded to reverse the trial court who had seen and heard the witnesses and the Appellate Division did not order a new trial but rendered judgment for the plaintiff for the recovery of the two hundred and fifty (250) shares of stock and **directed an accounting of sums received as dividends or otherwise by the defendant, applicable to said shares.**

Thereafter, an order was issued appointing Joseph Kahn, Esquire, to take the accounting.

The accounting continued from April, 1928, to Janu-
, 1929.

In January, 1929, the defendant discovered that the
intiff had fraudulently and surreptitiously suppressed
dence. That is, on November 23, 1925, the plaintiff,
ward H. Titus, and one London I. Wallick, estranged
ther of the defendant, drafted and executed a written
reement whereby the plaintiff, Edward H. Titus,
reed to prosecute this claim against the defendant and
n if the plaintiff was not successful, London I. Wal-
k was to prosecute some alleged claim of his against
defendant and then they were to share fifty-fifty in
results of either action. The plaintiff had, on the
ginal trial, been questioned as to whether or not he
d made any agreement with London I. Wallick about
case or about the claims and he absolutely denied
t any such agreement had been made. **The defendant
this ground moved for a vacation of the judgment
d for a new trial and the trial court held that the
intiff, Edward H. Titus, had perpetrated a fraud
on the court. The judgment was vacated long after
m.**

The plaintiff then appealed to the Appellate Division
d the Appellate Division could not escape the conclu-
n that the plaintiff had perpetrated a fraud upon the
rt.

The second trial of the New York case in December,
0, again resulted in a dismissal of the complaint.

Thereupon, the plaintiff appealed to the Appellate Di-
ion and the Appellate Division, again upon the cold

printed record reversed the trial court, rendered judgment of ownership in the plaintiff of the stock and ordered an accounting.

Thereupon, the defendant appealed to the Court of Appeals which affirmed the Appellate Division without opinion.

On May 11, 1932, an order of reference was made appointing Edmund McCarthy, Esq., to take the accounting.

McCarthy in his report of February 24, 1933, found no sums due from the defendant to the plaintiff.

Thereafter, the referee's report was refused by the trial court and a second referee, Jeremiah T. Mahoney, was appointed.

Referee Mahoney thereafter made a finding that although the plaintiff was entitled to no accounting for dividends the defendant had "wrongfully" withdrawn or caused to be withdrawn, (by way of alleged incorrect accounting in amortizing a lease, alleged excessive salaries to officers, alleged improper stock purchases, etc.) one million, fifty-nine dollars and twelve cents ($1,000,059.12) from the funds of The Secor Hotel Company to which he added five hundred and eleven thousand, two hundred and twenty-six dollars and nine cents ($511,226.09) interest and then proceeded to find that the plaintiff was entitled to one-fourth (¼) of that amount directly from the defendant **entirely disregarding The Secor Hotel Company and the fact that it was not a party to the case.**

The finding of Referee Mahoney was approved by the Supreme Court by opinion, Volume 2, "Case on Appeal,"

page 881, Defendant's Exhibit No. 5, the opinion being as follows:

> "The opinion of the learned referee in which he lucidly states the basis of every ruling he has made is a complete answer to every point made by the defendant in opposition to the motion to confirm the report. The report is confirmed. Submit judgment. Dated April 13, 1934. E. J. McG."

Thereupon, judgment was entered up against the defendant for three hundred seventy-seven thousand, eight hundred twenty-one dollars and thirty cents ($377,821.30).

On appeal to the Appellate Division, the Appellate Division affrmed the Supreme Court.

The petition in the case at bar was filed in the Common Pleas Court of Franklin county, Ohio, on August 20, 1934.

The Affidavit, the Assignment and the Fraud.

In 1934 after the judgment sued on by plaintiff was recovered in the New York courts, London I. Wallick, estranged brother of Lou C. Wallick, the defendant, brought an action in New York against Edward H. Titus, the plaintiff herein, London I. Wallick claiming that he owned a one-half (½) interest in the judgment sued upon herein and asked for a temporary restraining order enjoining Edward H. Titus from disposing of the judgement or the proceeds. London I. Wallick based his claim upon the aforesaid agreement between him and Edward H. Titus of November 23, 1925. In opposition to the application of London I. Wallick for that restraining

order, Edward H. Titus, defendant therein and plaintiff herein, made an affidavit dated August 17, 1934, Defendant's Exhibit No. 7, which his attorneys filed September 7, 1934, in the New York case on behalf of Edward H. Titus, plaintiff herein.

Note: The petition at bar was filed August 20, 1934.

In said affidavit (Defendant's Exhibit No. 7) at the bottom of page five and top of page six thereof, Edward H. Titus deposes as follows:

> "I told him at that time (meaning November 23, 1925) that **I had already assigned any interest in the proceeds of said action against Lou C. Wallick to Walter L. Titus and Emilie F. Titus.**"

At the top of page eleven of said affidavit, Edward H. Titus deposes as follows:

> "His retention of said sum of $2,500.00 is likewise consistent with my statement that the plaintiff herein knew in November, 1925, and prior to the execution of the instrument of November 23, 1925, **that I had assigned my interest in the case against Lou C. Wallick to Walter L. Titus and Emilie F. Titus.**"

At the bottom of page eleven and the top of page twelve of said affidavit, Edward H. Titus deposes as follows:

> "The plaintiff's application for an injunction pendente lite should be denied. Prior to my execution of the instrument of November 23, 1925, **I assigned my interest in my claim against Lou C. Wallick to Walter L. Titus, my brother, and Emilie F. Titus, my wife.** The plaintiff herein knew of this assignment before the instrument of November 23, 1925, was executed. It is respectfully submitted

that it does not lie within the jurisdiction of this court to now enjoin what has already been accomplished."

This affidavit (Defendant's Exhibit 7), made in 1934, shows that Edward H. Titus has no interest whatever in this judgment and that he assigned away all of his interest in the claim prior to the time the suit was instituted in New York.

In connection with plaintiff's motion herein in the trial court to strike defendant's answer from the files, on the ground that it was a sham, defendant produced the affidavit, Exhibit 7, and **then appellant for the first time** produced the two instruments discussed by appellant in his brief (Defendant's Exhibit 8 and Plaintiff's Exhibit D). The first instrument dated March 31, 1924, is an absolute assignment from Edward H. Titus to Walter L. Titus of the entire claim. The second instrument dated December 1, 1925, is a power of attorney from Walter L. Titus to Edward H. Titus, the purpose of which, as expressed in the third "whereas" paragraph, was an attempt to authorize Edward H. Titus to bring suit. An analysis of the instrument of December 1, 1925, is:

1. The instrument of December 1, 1925, is no more than a bare power of attorney to Edward H. Titus to collect the claim and to bring suit.

2. It expressly appoints Edward H. Titus "true and lawful attorney" for Walter L. Titus with powers of substitution.

3. It provides that Edward H. Titus will receive the stock and money **"as property of" Walter L. Titus** and

will immediately endorse, deliver and transfer the same to Walter L. Titus.

4. If a trust has been created by the instrument of December 1, 1925, **the trustee is Walter L. Titus. If Edward H. Titus has any interest whatever in the judgment and claim, it is merely contingent.** The power of attorney was to authorize Edward H. Titus to bring an action, nothing more, and the **power was not incidental to other powers or duties given to Edward H. Titus.**

5. However, the affidavit of Edward H. Titus of August 17, 1934, shows conclusively that he, Edward H. Titus, after his assignment to his brother, no longer had or claimed any interest in the claim. The affidavit denies that he has any interest in the claim or judgment.

As stated by Judge Hornbeck of the Court of Appeals for Franklin county, Ohio, in his opinion, concurred in by the remaining Judges Barnes and Geiger **the second instrument which was executed December 1, 1925,** just before the suit in New York was instituted, **gave the plaintiff, Edward H. Titus, no authority whatever under the New York law or under the Ohio law to prosecute the action in his name.**

At the institution of this case in the Common Pleas Court, Franklin county, Ohio, plaintiff was not the real party in interest. The trial judge made the following finding:

> "3. The court finds as a conclusion of law that the plaintiff herein is not the real party in interest in this action and has no right to maintain this action in his name."

The Court of Appeals in its decision stated:

> "With the finding that the plaintiff was not the real party in interest in the action in Ohio and in New York we are in accord upon a fair consideration of the status of the plaintiff, his brother and the defendant."

This finding by the trial court and affirmed by the Court of Appeals and undisturbed by the Supreme Court, constituted a local question of procedure involving the construction and interpretation of the procedural real party in interest statute of the state of Ohio and in no way involved the full faith and credit clause of the United States Constitution.

At the time of the institution of the New York case, plaintiff had assigned away his claim. Although the New York law required that the action be prosecuted in the name of the real party in interest, the plaintiff prosecuted the action in his name although he had no interest in the same and represented himself throughout the action to be the real party in interest and suppressed the fact that he was not.

On the witness stand in the case in the state of New York, Edward H. Titus testified and represented that he was the only one interested in the alleged claim.

The trial court below, Judge Leach, made the following finding of fact:

> "9. That at the institution of the suit in which the plaintiff recovered said judgment, and at all times during the litigation of said suit, the plaintiff was not the real party in interest and did not own or have any interest in the alleged claim against the defendant therein sued upon and plaintiff in and

during said litigation suppressed and concealed the fact from the court and from the defendant."

As conclusions of law the trial judge made the following findings:

"4. That the **plaintiff's judgment** procured in the courts of New York **was procured through fraud practiced upon the New York courts and upon the defendant,** in that at the institution of the suit in which the plaintiff recovered said judgment, and at all times during the litigation of said suit, the plaintiff was not the real party in interest and did not own or have any interest in the alleged claims against the defendant therein sued upon and had no right to prosecute said suit on the same in his name.

"5. That during said litigation in the courts of New York, **the plaintiff suppressed and concealed the fact that a person or persons other than himself owned the claims** upon which suit was brought in his name and were the real parties in interest in whose name or names alone suit could be rightfully prosecuted.

"6. That the **said judgment** so obtained in the state of New York was and **is impeachable therefor fraud and it was and is to the same extent impeachable in the courts of Ohio."**

A complete copy of the findings of the trial judge are attached as Appendix A.

After the decision of the trial court was announced plaintiff filed a motion for new trial, assigning certain errors. A copy of the motion is attached to this brief as Appendix C. No constitutional question is raised by those assignments.

In appealing to the Court of Appeals in Ohio it was necessary for plaintiff to specify the claimed errors to

e reviewed. Attached as Appendix B is a copy of those ssignments of error. No constitutional question is aised by those assignments.

When this case came to the attention of the Supreme ourt of Ohio, no constitutional question had been prop-rly raised and there was no basis for review on that round. And since the Supreme Court of Ohio had in **rown v. Ginn**, 66 O. S., 316, construed the real party in nterest statute (a purely local question) squarely on the oints raised, there remained nothing for the Ohio Su-reme Court to review. Hence the motion before it, to ertify up the record, was properly denied.

ssues at Bar Below.

The issues were three in number as follows:

I. The purported judgment in the New York proceed-ngs is not responsive to the issues tendered by the leadings, nor to the matters actually controverted.

II. **The plaintiff in the action at bar in the Common Pleas Court, Franklin county, Ohio, was not the real party in interest.**

III. The purported judgment in the New York pro-eeding was procured through fraud practiced by the laintiff upon the New York court and upon the defend-nt in that plaintiff was at no time the real party in nterest and he surreptitiously suppressed and concealed hat fact.

The trial court found against the defendant on the first ssue. The trial court found in favor of the defendant n the second and third issues and the trial court wa

affirmed by the Court of Appeals, in which affirmance the three judges of the Court of Appeals concurred. The Supreme Court of Ohio refused to review.

The action was for a personal judgment against the defendant, predicated on the pleaded judgment obtained in New York. The federal constitution, of course, provides that full faith and credit shall be given in each state to the judicial proceedings of every other state. There is no debatable question about that. The issue, however, was, second, whether plaintiff could sue in his name in an Ohio court, and, third, whether or not the plaintiff had procured the judgment in the New York courts through practicing fraud on the court and on the defendant in the procuring of the judgment. **The second issue was a local question.**

As to the third issue, **if the fraud was practiced on the court and on the defendant in the procuring of the judgment, then the plaintiff has no judgment to which any faith or credit is to be given. There is no debatable or substantial question about that. The trial court held as a matter of fact that the plaintiff had practiced a fraud on the defendant and on the New York court in procuring the New York judgment,** and the trial court found as a matter of law that for that fact the judgment is impeachable in New York as well as elsewhere. **The Court of Appeals properly affirmed these findings by an unanimous decision.** The third from the last paragraph of the opinion of the Court of Appeals is as follows:

> "It is our judgment that the trial court properly applied the law in the determination that the plaintiff suppressed and concealed from the court and from the defendant the fact that he was not a proper party plaintiff and the real party in interest in the action against the defendant in New York, and in finding that such conduct was extrinsic fraud in prosecuting the cause to judgment, which supported the third defense of the answer."

ARGUMENT.

SUMMARY OF ARGUMENT.

Proposition 1. There is an independent ground of state procedure as the basis of the decisions below involving no federal question, and broad enough to sustain the judgment, and hence this court is without jurisdiction.

Proposition 2. It does not appear that the Supreme Court of Ohio dealt with the question of fraud in the procurement of the New York judgment. A federal question was not properly presented before that court, and it must be concluded that the only question considered by the Supreme Court of Ohio was the question of local procedure under the Ohio real party in interest statute.

Proposition 3. It does not affirmatively appear that a federal question was properly presented to the Supreme Court of Ohio, or that a federal question was actually decided, or that the decision of a federal question was necessary to a determination.

Proposition 4. Even though it should appear in doubt as to which of the grounds the Ohio Supreme Court considered, this court has no jurisdiction for the reason that one of the grounds is a local procedural matter involving the construction and application of a local procedural statute.

Proposition 5. The trial court, sitting as a jury, found that the plaintiff as such in the Ohio court, was

not the real party in interest under the Ohio statute. The trial court found further that the plaintiff in the New York proceeding had perpetrated a fraud upon the New York courts and upon the defendant in obtaining the alleged judgment sued upon in Ohio. These facts were not disturbed by the reviewing courts of Ohio, and are binding upon this court.

PROPOSITION I.

The Ohio Courts Decided Against the Petitioner on an Independent Ground of State Procedure.

This court in the case of **Gaar, Scott and Company v. Shannon**, 223 U. S., 468 at 470, lays down the following rule:

> "For as repeatedly ruled, where a state court has decided against the plaintiff in error on a matter of general law broad enough to sustain the judgment, this court will not consider the federal questions, even though they may have been actually considered and determined adversely to his contention."

And in **Hammond v. Johnson**, 142 U. S., 73 at 78, the court had earlier made the following observation:

> "It is well settled that where the Supreme Court of a state decides a federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a federal question and broad enough to maintain the judgment, the writ of error will be dismissed without considering the federal question."

The plaintiff petitioner in the Common Pleas Court of Franklin county, Ohio, started this action by filing a

petition against the defendant asking for a money judgment.

The procedural statute of Ohio provides that an action must be prosecuted in the name of the real party in interest.

Section 11241 of the **Ohio General Code** is as follows:

> "An action must be prosecuted in the name of the real party in interest, except as provided in the next three succeeding sections. When a party asks that he may recover by virtue of an assignment, the right of set-off, counter-claim, and defense, as allowed by law, shall not be impaired."

Section 11244 of the **Ohio General Code** is as follows:

> "An executor, administrator, or guardian, a trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law."

These sections of the Ohio statutes had been construed by the Supreme Court of Ohio prior to the institution of the action at bar and particularly in the case of **Brown v. Ginn**, 66 O. S., 316.

To the petition of the plaintiff petitioner, the defendant in the trial court, pleaded a separate and distinct defense that the plainiff was not the real party in interest and therefore could not prosecute this action in Ohio in his name. The trial court on the evidence, and sitting as a jury by consent of the parties, found that the plaintiff was not the real party in interest in the action at bar

under the law of the forum, and therefore, could not maintain this action in his name. This question was one of local procedure under the state statutes and as construed by the decisions of the Supreme Court of Ohio. The trial court on this question was affirmed by the Court of Appeals for Franklin county, Ohio, and the Supreme Court of Ohio refused to review.

Hence upon the authority of Gaar, Scott and Company v. Shannon, supra, and Hammond v. Johnson, supra, this court will not assume jurisdiction.

PROPOSITION II.

It Does Not Appear that the Supreme Court of Ohio Dealt with any Federal Question.

In the assignments of error, filed in the Court of Appeals for Franklin county, Ohio, no federal question was raised. The errors assigned are characterized by that court in the fourth paragraph of its opinion as follows:

> "There are fourteen errors assigned, which may be grouped under the general headings that **the judgment is contrary to law and against the manifest weight of the evidence; the court erred in admitting certain evidence; in the conclusions of law and fact and in refusing to find 'whether a reassignment of the claim (upon which the judgment in New York was rendered) was made by Walter L. Titus to Edward H. Titus on December 1, 1925.'**"

After the Court of Appeals had concurred in the findings of the trial court and the legal conclusions reached by the trial court, the plaintiff petitioner took two

courses of procedure in going to the Supreme Court of Ohio: first he filed a motion in the Supreme Court of Ohio asking for an order "directing said Court of Appeals to certify its record to the Supreme Court" on the ground "that said case is one of both public and general interest" within meaning of Article IV, Section 2 of the Ohio Constitution, and with that motion he filed assignments of error in which for the first time, the plaintiff petitioner specifically claimed that a federal question was involved in the way of violation of the full faith and credit clause of the United States Constitution; second, the plaintiff filed in the Supreme Court of Ohio an appeal as of right on the ground that "a debatable constitutional question" was involved. The defendant respondent then filed a motion to dismiss the appeal as of right. The Supreme Court of Ohio, without opinion, dismissed the appeal taken as of right and overruled the motion to certify.

Either of two propositions of local Ohio law would have disposed of the appeal as of right in the Supreme Court of Ohio:

> **"If the constitutional question claimed to be involved in the case is not submitted to or decided by the Court of Appeals, the motion to dismiss should be sustained."**
>
> **Hoffman v. Staley**, 92 O. S., 505.

> **"If the record * * * does not show that the disposition of the case requires the consideration of any constitutional question, it will be dismissed for want of jurisdition."**
>
> **2 O. Jur.**, 63.

As to the motion to certify, there was no question of public or general interest for the consideration of that court for the very good reason that the Supreme Court of Ohio had previously in Brown v. Ginn, supra, decided the procedural question involved and consequently that question was foreclosed against the plaintiff petitioner.

Hence it does not appear that the Supreme Court of Ohio dealt with any federal question, but on the contrary, based its ruling on the question of local procedure.

In this connection we quote from Volume 5 of Hughes Federal Practice, page 315:

> "A federal question, although referred to in the assignments of error in the state appellate court and in the Supreme Court of the United States, cannot be considered by the latter where it does not appear that the state court dealt with the question, and where it appears that the state court may have refused to deal with it on the ground that it was not raised in the trial court."

PROPOSITION III.

It Does Not Appear that the Decision of a Federal Question Was Necessary to the Determination by the Supreme Court of Ohio.

This court in the case of **Whitney v. California**, 274 U. S., 357 at 360, spoke as follows:

> "It has long been settled that this court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a federal question constituting an appropriate ground for such review was presented in and **expressly or necessarily decided by such state court.**"

No federal question was **expressly** decided by the Supreme Court of Ohio and no federal question was **necessarily** decided by the Supreme Court of Ohio for there was an independent ground for the decision of the trial court as well as of the decision of the Court of Appeals for Franklin county which ground involved no federal question, and hence the Supreme Court of Ohio could have disposed of and in all probability did dispose of the case on that independent ground which involved no federal question.

PROPOSITION IV.

At Least There Is Doubt Whether the Supreme Court of Ohio Dealt with a Federal Question.

Where it does not appear upon which of two grounds the decision was based, whether the federal or non-federal ground, then if the independent ground on which it might have been based was a good and valid one, sufficient to sustain the judgment, this court will not assume jurisdiction.

Klinger v. Missouri, 13 Wall., 257.

PROPOSITION V.

The Decisions of the State Courts Rest Upon a Finding of Facts Made by the State Trial Court. This Court Will Not Weigh the Evidence.

In the case at bar the trial judge sitting as a jury with the consent of the parties, made a finding of facts at the special written request of the plaintiff petitioner. It was found from the evidence that the plaintiff petitioner was not the real party in interest in the Ohio court. It was also found that the judgment sued upon was procured through fraud practiced upon the defendant and upon the New York courts by the plaintiff petitioner. The Court of Appeals for Franklin county, Ohio, weighed the evidence and stated in its opinion that it was in accord with the findings of the trial court. This court will find in the record ample evidence supporting those findings.

This court in the case of **Ry. Co. v. Donaldson, Administrator**, 246 U. S., 121 at 124, spoke as follows:

> "The record shows testimony supporting the verdict, and that is as far as this court enters upon a consideration of that question."

DISCUSSION OF PETITIONER'S BRIEF.

In the first trial of the New York case the plaintiff petitioner testified that he was the only one interested in the case. Defendant's Exhibit 1, page 133, second part, folio 399. Long after judgment against the defendant pursuant to the first trial there, in the New York courts,

the defendant discovered that plaintiff and London Wallick, estranged brother of defendant, had prior to the institution of the New York suit, entered into a fifty-fifty split agreement to divide the proceeds of the New York suit and further that if the plaintiff was unsuccessful, then London Wallick would start some kind of a suit against the defendant and Titus would share fifty-fifty in the proceeds of that litigation. For fifty-fifty agreement see Defendant's Exhibit 3, page 626.

Justice Valente, on motion of defendant for a new trial in the New York Supreme Court, held that the plaintiff had in suppressing this fifty-fifty agreement, practiced fraud upon the court and upon the defendant and he set the judgment aside. Defendant's Exhibit 3, page 761. The Appellate Division could not escape this same conclusion.

Then on the second trial, the plaintiff in half truths and by misleading testimony, knowing that counsel for defendant was under the mistaken impression that some kind of an agreement had been made after the New York suit had been filed, suppressed the fact of his assignment to his brother which had been made twenty-one (21) months before the New York litigation had been started. Defendant's Exhibit 3, page 163, folio 489.

Then in 1934 at the time the action at bar was started in Ohio, the plaintiff filed his affidavit, Defendant's Exhibit 7, in the London Wallick action in New York for injunction, in which affidavit the plaintiff deliberately states that prior to November 23, 1925, he had assigned away all of his interest in the claim, to his brother and

wife and that he, the plaintiff, no longer had any interest in the judgment or in the claim.

When the plaintiff was confronted in the Ohio court with the affidavit, then plaintiff came forward for the first time with the assignment, Defendant's Exhibit A, and the writing, Plaintiff's Exhibit D.

Then the plaintiff proceeded to contend that in spite of the affidavit and the assignment he was still and always had been the real party in interest, and that any way the matter was res judicata even though the plaintiff had suppressed the fact and defendant had not discovered it.

One way to characterize the issue in this case is to put it this way: may a party for his benefit, say to one court, "I have no interest in this claim or judgment," and at the same time say to the court of the sister state, "the claim and judgment is mine." This is a simple proposition as to whether or not there is any rule of good words and whether a party may at his whim repudiate and deny that which he has solemnly stated and that which his written documents bear out.

Briefly, we call attention to the New York law on the question of the New York real party in interest statute. Section 210 **Civil Practice Act of New York**, pleaded in amendment to amended answer and admitted by plaintiff in reply, is as follows:

"Section 210. Action to be brought in name of real party in interest. Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, a person with whom or in whose name a contract is made, for the benefit of another, or a person

expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted."

Spencer v. Standard Chemicals & Metals Corporation, 143 N. E., 651; Ct. of App. N. Y., 1924 (237 N. Y., 479):

"Syllabus 1. Under Code Civil Procedure Sections 111, 113 (Civil Practice Act, Section 210), assignee must have legal or equitable title to thing assigned to sue in his own name as real party in interest, irrespective of consideration paid, purpose of assignment, or use to be made of proceeds collected.

"Syllabus 2. One empowered by instrument to prosecute suits for recovery of debts, etc., due the maker, in name of either, **held** not trustee of express trust, or assignee of legal title or equitable interest, but mere attorney in fact, not authorized to sue in his own name as real party in interest, under Civil Practice Act, Section 210."

Page 652: "Andrews, J. When we adopted our scheme of reformed practice, one purpose being to end in part the ancient distinctions between law and equity, we provided that every action must be prosecuted in the name of the real party in interest. Code of Procedure, Section 111. A few exceptions were made. A trustee of an express suit, for instance, might still sue without joining with him the person for whose benefit the action is prosecuted and later such a trustee was defined to include one with whom or in whose name a contract is made for the benefit of another. Code of Procedure, Section 113. Theretofore, as the commissioners on practice and pleadings pointed out in their report, if the assignee sued at law he was turned out of court, and if the assignor sued in equity he was turned out also. So the rule adopted in courts of equity was made general, 'that he who has the right is the person to pursue the remedy.' First Report, page 124. It was not the design to give a new cause of action where none previously existed, but to permit and require

the beneficial owner to enforce his rights in his own name.

"The real party in interest has been defined by this court: 'If, as between the assignor and the assignee, the transfer is complete, so that the former is divested of all control and right to the cause of action, and the latter is entitled to control it and receive its fruits, the assignee is the real party in interest.' Cumings v. Morris, 25 N. Y., 625.

"In other words, the plaintiff must have some title, legal or equitable, to the things assigned. Hays v. Hathorn, 74 N. Y., 486. If the assignee have such title it is enough. The consideration paid, the purpose of the assignment, the use to be made, of any proceeds collected, is immaterial. Allen v. Brown, 44 N. Y., 228; Meeker v. Claghorn, 44 N. Y., 349; Sheridan v. Mayor, etc., of New York, 68 N. Y., 30; Brown v. Powers, 53 App. Div., 251, 65 N. Y. Supp., 733. But legal title or equitable interest he must have.

"This action is brought by Harold R. Spencer to recover the balance of the purchase price of certain ore said to have been sold by one Quan Kai to the defendant. It was alleged in the complaint that the cause of action had been duly assigned to the plaintiff. This was denied. At the close of the plaintiff's case the purported assignment was offered in evidence. This instrument named Spencer as attorney for Quan Kai, and gave him, among other things, 'power to commence or prosecute any suit or action or other legal proceedings for the recovery of damages, * * * debts, demands, choses in action, causes or things whatsoever in the United States of America due or to become due to me and to prosecute and follow and discontinue the same if he shall deem it proper and for me and in my or his name to take all steps and remedies necessary and proper for the recovery * * * of any * * * sum or sums of money, choses in action or other things whatsoever that is, are, or shall be by my said attorney thought to be

due * * * to me in my right or otherwise, and also for me and in my name to compromise, settle, and adjust all causes.' The attorney was also authorized to sign any release or receipt and he was given power to substitute other attorneys in his place. When this instrument was offered in evidence objection was made that it was not competent because it did not constitute an assignment but was a mere power of attorney. The attention of the trial judge was therefore sharply called to this question. The paper was received in evidence and an exception taken.

"The plaintiff is clearly not within any of the definitions of the trustee of an express trust. No legal title to the claim against the defendant was assigned to him. Neither does it appear that he has any equitable interest therein. Upon the face of the paper the attorney's duty is simply to collect what may be due to Quan Kai solely for the latter's benefit and to transmit it to him. It is the ordinary case of the appointment of an attorney in fact. The attempt to authorize such attorney to sue in his own name is, under the provisions of Section 210 of the Civil Practice Act, which in this respect follows the original code, entirely unavailing."

ere Fraud Is Practiced by a Party in Procuring a Judgment, the Judgment Is Assailable on that Ground in a Sister State and Without First Making Application to the Court Rendering the Judgment.

the impeachability of a foreign judgment, the general rule is stated in 15 R. C. L., page 935, as follows:

"But **the weight of authority today is that a judgment of another state**, relied on as a cause of action, **may be impeached on the ground that it was obtained by fraud**, unless the parties raising the question of fraud are estopped from availing themselves of it by reason of participation in such fraud."

The court of last resort of the state of New York in **Gray v. Richmond Bicycle Company**, 167 N. Y., 348, recognizes that application need not be made to the court rendering the judgment in order to assail the same on the ground of fraud in the procurement thereof. The following is syllabus three of that case:

> "Relief from fraudulent foreign judgment may be granted by courts of this state. **Relief may be obtained from the judgment, if fraudulent, without the application to the courts of the other state**, and it cannot be indirectly enforced as a bar to the action, since a court of this state may, where it has jurisdiction of the parties, determine the question whether a judgment between them, rendered in another state was obtained by fraud, and, if so, may enjoin the enforcement of it, although its subject-matter is situated in such other state."

A judgment may be attacked any time, anywhere, for fraud practiced as in this case in prosecuting the action. This is well recognized in the above New York case as well as in **Martin Corley, infant by Walter Duncan, his Guardian ad litem, v. New York and Harlem Railroad Company**, App. Div. Sup. Ct. of N. Y. 1896; 12 App. Div. (N. Y.), 409, pages 410-411:

> "On the ground of fraud practiced upon the court and jury during the trial, the judgment should be set aside and a new trial granted. It was said in Ward v. Town of Southfield (102 N. Y., 287) by Earl J.: 'A party defeated in a litigation may appeal from the judgment or move for a new trial, and, in a proper case, to vacate and set aside the judgment. These remedies are generally ample to protect all parties. But where there is fraud not in the subject of litigation, not in anything which was involved in the issue tried, but fraud practiced upon a party.

or upon the court during the trial, or in prosecuting the action, or in obtaining the judgment may be attacked collaterally, and on account thereof set aside and vacated' This is a case of 'fraud practiced upon a party * * * during the trial'; and if it is ground for a collateral attack, it is certainly ground for setting aside the judgment in the same action, as the Ward case plainly indicates. That case was cited and applied to the case of a motion in the same action, in Harris v. Ditson (13 N. Y. St. Repr., 337), a case decided by the General Term in this department."

nslee as Administratrix, etc., v. Rochester and Syra-e Railroad Company, 214 App. Div. (N. Y.), page 680, n example of fraud in prosecuting an action:

"A new trial will be granted in an action to recover damages for the wrongful death of plaintiff's intestate, her son, where it appears that the complaint alleged that the intestate left him surviving his mother, and did not allege that the father of the intestate, who had been divorced from the intestate's mother was living also, and did not on the trial bring that fact to the attention of the jury and in fact, fraudulently concealed the existence of the father and permitted associate counsel to refer to the mother as a widow, and such fact was not discovered by the defendant until after the close of the trial and the entry of judgment."

Complainant alleged that the son was wrongfully led and that the mother only survived him. No refere was made to the father. In the trial, plaintiff was stantly referred to as the "widow." The Appellate ision ordered a new trial, because the attorney of the intiff knew that the father was living and did not so

state and further permitted the associate counsel to refer to the plaintiff as "widow." The court said on page 62:

"What effect such a statement several times repeated might have on the sympathies of the jury we do not know but the statement was made and was not supported by any evidence. In making this statement to the jury to the effect that plaintiff was a widow, counsel had no intent to deceive, for he was probably without knowledge as to the actual status of the plaintiff, but his reference to her as a widow was not based on any evidence in the case and was, therefore, improper.

"**Good faith required that the fact that decedent left a father surviving him should have been disclosed either in the complaint or on the trial, but it is quite clear that there was an intent to conceal that fact** and let the case go to the jury on the theory that the plaintiff was a widow and the sole next kin of decedent.

"Whether or not the father contributed to plaintiff's support is not important. **The fact that he was living** and, therefore, the plaintiff was not the sole next of kin of decedent **was surreptitiously withheld**. A judgment thus obtained should not stand. The court cannot approve a practice which in effect amounted to a legal fraud and a judgment thus tainted must be set aside. (Stevens v. C. N. Bank, 144 N. Y., 50; Wolff v. United Drug Company, Inc., 181 App. Div., 628.)"

In this very case in the New York courts, the New York courts held that suppression by Edward H. Titus of the fact of his agreement with London I. Wallick concerning a partial assignment of the claim, constituted a fraud upon the court. A fortiori the suppression by the plaintiff of the fact of an absolute and entire assignment certainly constitutes fraud upon the New York courts as well as upon the defendant.

In the case at bar, the judgment assumed the existence a real plaintiff in interest. That issue was not raised tried in the New York case because of the ignorance the defendant and the surreptitious concealment of the cts by the plaintiff. Hence the doctrine of res judicata ed on by petitioner has absolutely no application. w it appears that there was no real plaintiff in interest. Counsel cite several New York cases to sustain their tement that a judgment will not be set aside or en- rcement enjoined by reason of intrinsic fraud. We ve no quarrel with that proposition. In Jacobwitz v. rson, the unsuccessful party in an arbitration proceed- g sought to set aside the award on the ground of per- ry, that the successful party and his witness testified lsely on the issues. The court said that although per- red testimony alone is not sufficient to set aside a dgment, however, a judgment would be set aside where has been procured through fraud or other undue means, hich would include the fraudulent or improper conduct a party. In the case at bar, the plaintiff was guilty of udulent and improper conduct in the procurement. In matter of Holden cited by counsel, the assignments question were as the New York court stated perfectly lid until legally set aside. The assignors by their act d vested legal title in the assignee. The fraud com- ained of was between the parties to the assignment d related to what the court characterized as a remote nsaction. The fraud in the case at bar consists of intiff representing to the New York court and to the fendant that he was the real party in interest and of rreptitiously withholding and concealing the fact that

he was not the real party in interest, when all the time he had not even a color of interest.

In the hypothetical case assumed in Harrington v. Denny, J. Otis sets forth the same kind of facts as in United States v. Throckmorton discussed infra and naturally reaches the same conclusion.

In Wright v. Saltmarsh, the court said "The contention that the decree of distribution was obtained by fraud in not disclosing the fact of the probate proceedings in the state of Kansas cannot be urged for the reason that to disclose such proceedings would have no effect whatever upon rights of these parties in Oklahoma, and therefore the defendant owed no duty to the court to disclose to it what some other court in some other state had done with the property in that state." The court said further that the action was nothing more than an effort to avoid the decree of distribution on the ground of alleged false proof presented in the matter. In the case at bar the plaintiff not only testified falsely but in addition he suppressed and concealed and remained silent on the fact of which defendant was ignorant, that he the plaintiff had no interest whatever in the alleged claims against the defendant and hence had no standing whatsoever in court. The result was that the court had no real plaintiff before it.

On page 2582 of Freeman's Work, he discusses the rule of **some jurisdictions where perjury alone may constitute such fraud** as will invoke equitable relief against the judgment especially where there is willful perjury of or at the instigation of the successful party. **However**, in

the case at bar, there is something more serious than mere perjury.

The fraud in Ward v. Town of Southfield, cited by counsel was intrinsic fraud going to the subject-matter of the litigation like the other cases cited by counsel.

It is noted that counsel omit from their reference to the **Southfield case** the following, appearing at the bottom of page 292 of the report (102 N. Y.):

> "But where there is fraud, not in the subject of the litigation, not in anything which was involved in the issues tried, but fraud practiced upon a party or upon the court during the trial, or in prosecuting the action, or obtaining the judgment, then in a proper case the judgment may be attacked collaterally, and on account thereof, set aside and vacated."

Neither do counsel in their reference to the **Southfield case** include the following appearing on page 293:

> "Neither party can mislead the other by any positive or actual fraud. Nor can he, for the purpose of perpetrating a fraud upon the other party, conceal such facts as good faith and common honesty require him to reveal."

Note: The **Southfield case** is relied on in Corley v. Railroad Company, supra.

Counsels' cases deal with intrinsic fraud. With those cases we have no quarrel. However, they do not apply to the case at bar. **There seems to be an unanimity of opinion on the proposition that for extrinsic fraud a judgment may be assailed at any time, anywhere.**

In **Armstrong v. Armstrong**, 117 O. S., 558, cited by appellant, the question was whether an order for alimony to be paid in future installments, entered by a Kentucky

court, is within the protection of the full faith and credit clause. It was contended that the alimony order was not a final judgment. And as Judge Matthias stated "there has been much confusion, and contrariety of opinion" on that question. There is no confusion or contrariety of opinion concerning the question in the case at bar. The question is long and well settled and is not debatable.

After quoting the full faith and credit clause Chief Justice Fuller of this court speaks as follows: "This does not prevent an inquiry into the jurisdiction of the court, in which a judgment is rendered, to pronounce the judgment, nor in the right of the state to exercise authority over the parties or the subject matter, **nor whether the judgment is founded in, and impeachable for, a manifest fraud.** The Constitution did not mean to confer any new power on the states, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of the state domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them as evidence."

Cole v. Cunningham (1889), 133 U. S., 107 at 112.

In **U. S. v. Throckmorton** relied on by petitioner, the full faith and credit clause was not in any remote degree involved. The fraud was in the very issues of the case, i. e., an antidated grant supported by depositions of perjured witnesses. The United States filed a bill in U. S. District Court of California to set aside adjudications of a board of commissioners of land claims and of that

ourt affirming the commissioners. No such question as t bar was before the court. And this court has veered way from its dicta of the Throckmorton case for in **ilton v. Guyot,** 159 U. S., 113 at 207, in commenting on he Throckmorton case, the court says with respect to raud:

> "But it is now established in England, by well considered and strongly reasoned decisions of the Court of Appeals, that foreign judgments may be impeached, if procured by false and fraudulent representations and testimony of the plaintiff, even if the same question of fraud was presented to and decided by the foreign court."

After reciting the full faith and credit clause Van De- anter, J., states: "The effect of these provisions is that the courts of other states the judgment of a court of he state is not impeachable except for fraud or want of risdiction * * *."

Lamb v. Stock Co., 132 Federal Rep., 431 at 441.

We quote the following from various jurisdictions:

> "Under Const. U. S., Art. 4, Sec. 1, judgments of a sister state are entitled to no greater credit than will be given thereto by the courts of the state where rendered, and may, in an action thereon, be impeached for want of jurisdiction or fraud in their procurement."

Cohen et al. v. Bromberg, Syl. 1 (Iowa 1919), 170 N. W., 478.

"Though, under Const. U. S., Art. 4, Sec. 1, judgment of Ohio court is entitled to same effect in tribunals of Kentucky that it is entitled to in Ohio, it

can be attacked in Kentucky on any grounds that would invalidate it in Ohio."

Syl. 2, **Capper v. Short** (Ky. 1928), 11 S. W. (2d), 717.

"In other words, if the judgment is not conclusive, but open to a direct attack for fraud when rendered, it is also open to collateral attack on the same ground, when brought forward as a defense or a cause of action in the courts of a sister state."

Schendel v. Ry. Co., 210 N. W., 70 at 73 (Minn. 1926).

"Judgments, whether foreign or domestic may be attacked for want of jurisdiction in court trying same or for want of service or fraud in procurement."

Syl. 3, **Mendlovitz v. Shoe Co.**, 5 S. W. (2d), 589 (Texas 1928).

"Under full faith and credit clause of Const. U. S. Art. 4, Sec. 2 and Act of Congress (U. S. Comp. St. Sec. 1519) a judgment of one state sued on in another state may be impeached for fraud perpetrated in its procurement, if it might be so impeached in the state in which rendered, as in the case in Oklahoma."

Syl. 4, **Hare v. Reily** (Texas 1925), 269 S. W., 471.

"Judgment entered by court in sister state, and sued on in this state, may be set aside for fraud in obtaining it, notwithstanding Const. U. S., Art. 4, Sec. 1, requiring full faith and credit to be given to judgment of sister state."

Syl. 3, **Dyer v. Johnson** (Texas 1929), 19 S. W. (2d), 421.

"The only defenses that can be made to a judgment obtained in another state, when sued on here, are that the court of our sister state did not have jurisdiction of the person or of the subject matter, or that it was fraudulently procured, or had been paid."

Syl. 1, **White v. Minder** (N. J. 1930), 148 Atl., 781.

"The full faith and credit provision of Const. U. S., Art. 4, Sec. 1, does not prevent an inquiry, when suit is brought in one state on a judgment rendered in another, whether the judgment is impeachable for fraud."

Syl. 1, **Ring v. Whiteman** (N. C. 1927), 140 S. E., 150.

"Judgments of other states are conclusive of all questions involved in them except fraud in their procurement, and whether the parties were properly brought before the court in view of Const. U. S., Art. 4, Sec. 1, and acts of Congress enacted in pursuance thereof."

Syl. 4, **Webb v. Friedberg** (N. C. 1925), 126 S. E., 508.

"Under constitutional requirement that each state give full faith and credit to public acts and records of other states, **full faith can only be given to that which is a result of good and full faith, and credit can only be given when and where act, record or proceeding is not tainted with dishonesty and fraud** practiced upon the state issuing or participating in same."

Morris v. Morris, 1936, 280 N. Y. S., 636, Syl. 4.

"Judgment rendered by competent tribunal having jurisdiction is conclusive on merits in courts of another state unless fraud is established."

Syl. 2, **Franklin v. Lee**, 253 N. Y. S., 620 (1931).

"'Full faith and credit' clause and rule of comity of states were not intended to aid in perpetration of fraud or wrong (Article IV, Section 1, U. S. Constitution)."

Syl. 6, **Larrick v. Walters**, 39 O. A., 363.

In **Christmas v. Russell**, 72 U. S., 290, relied on by petitioner, the action was on a note, the defendant being a resident of Mississippi. By the Mississippi statute the action was barred after six years. Suit was had in Kentucky while defendant was visiting there. The Mississippi statute was set up in defense, but judgment was entered. A transcript was taken to Mississippi and suit on in the United States Court there. A further Mississippi statute provided that no action could be maintained on a judgment rendered by a court without the state against a resident of Mississippi in a case where the action would have been barred in Mississippi.

This court held the above latter statute to be void.

It was also claimed that the judgment had been obtained in fraud of this statute. This court, page 304, seemed to think that the question of fraud would have to be raised on the chancery side. And in this connection referred to **Anderson v. Anderson**, 8 Ohio, 105. In Ohio now as a matter of practice (which was not the practice at the time Anderson v. Anderson was decided) a defendant is permitted in actions at law to set up legal or equitable defenses or both.

Since Christmas v. Russell was decided this court has in Cole v. Cunningham supra recognized the right of a state to inquire into the question of whether or not the judgment of a sister state was founded in fraud.

And as late as 1935 in **Milwaukee County v. White Co.**, 296 U. S., 268, at 276, this court has recognized that recovery on the judgment of a sister state can be resisted on the ground that it was procured through fraud.

CONCLUSIONS.

I.

There is an independent ground of state procedure as a basis for the decisions below, and hence this court has no jurisdiction.

II.

The question of fraud in procuring the New York judgment is a question of fact which was found and determined by the lower courts. This court will not weigh the evidence.

III.

The alleged constitutional question is not substantial or debatable, and is settled.

ON MOTION OF THE PETITIONER TO PRINT ABBREVIATED RECORD.

Throughout the petitioner's brief he is in effect praying this court to review and weigh the evidence on the question of fraud. If the plaintiff is sincere in this request, then we submit he can scarcely expect the court to comply with his request without furnishing the complete record.

Respectfully submitted,

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W. M. SUMMER,
Of Counsel.

APPENDIX A.

Statement in Writing of the Facts Found Separately from the Conclusions of Law, by Judge Leach in the Trial Court.

A. Finding of Facts.

1. That by consideration of the Supreme Court in and for the county of New York in the borough of Manhattan, city of New York, on the first day of May, 1934, the plaintiff recovered a judgment against the defendant in the sum of three hundred seventy-seven thousand, eight hundred twenty-one 30/100 ($377,821.30) dollars, with interest from January 1, 1934, on the sum of two hundred fifty thousand, fourteen and 78/100 ($250,014.78) dollars, amounting to the sum of six thousand three hundred thirty-three and 71/100 ($6,333.71) dollars, together with the cost duly taxed in the sum of four thousand nine hundred forty-eight and 20/100 ($4,948.20) dollars, making in all the sum of three hundred eighty-nine thousand one hundred three and 21/100 ($389,103.21) dollars.

2. That said Supreme Court in and for the county of New York in the borough of Manhattan, city of New York, was and is a court of general jurisdiction, duly created by the laws of the state of New York.

3. That no part of said judgment has been paid.

4. That the petition in this action in the Court of Com-

mon Pleas of Franklin county, Ohio, was filed on August 20, 1934.

5. The defendant, Lou C. Wallick, appeared and took an actual part in the litigation which resulted in the judgment against him in the Supreme Court in and for the county of New York, in the borough of Manhattan, city of New York, being the same judgment pleaded in the petition in this case.

6. That subsequent to May 1, 1934, and prior to August 20, 1934 (the date on which the petition and pending cause in the Court of Common Pleas in Franklin county was filed), London I. Wallick, a brother of the defendant in this case, instituted an action in the Supreme Court of the state of New York, county of New York, in an attempt to obtain from the plaintiff, Edward H. Titus, a part of the proceeds of plaintiff's judgment in the courts of New York and filed a motion "for an injunction pendente lite restraining me (Edward H. Titus, the defendant in that case and plaintiff here) from disposing of, encumbering, pledging, assigning or in any manner dealing with the monies received or to be received on account of a judgment entered in my (Edward H. Titus) favor against one Lou C. Wallick, in the office of the clerk of the county of New York in the sum of $389,-103.21."

7. On the seventeenth day of August, 1934, the plaintiff herein, Edward H. Titus, under oath, made and filed an affidavit in the said court in opposition to London I. Wallick's motion for the injunction. In said affidavit, so filed with the court, the plaintiff stated [illegible] other

things, "I told him (London I. Wallick) at that time (November 23, 1925, when agreement between London I. Wallick and Edward H. Titus for fifty-fifty split of proceeds of the New York litigation against Lou C. Wallick, was executed, record on appeal. Defendant's Exhibit No. 3, page 626); that I had already assigned any interest in the proceeds of said action against Lou C. Wallick to Walter L. Titus and Emilie F. Titus" (parenthetical insertion by the writer).

Edward H. Titus, plaintiff herein, further stated in said affidavit: "The plaintiff's application for an injunction pendente lite should be denied. Prior to my execution of the instrument of November 23, 1925, I assigned my interest in my claim against Lou C. Wallick to Walter L. Titus, my brother, and Emilie F. Titus, my wife * * *. It is respectfully submitted that it does not lie within the jurisdiction of this court to now enjoin what has already been accomplished."

8. That the facts as stated by the foregoing quoted excerpts from the said affidavit were and are true.

9. That at the institution of the suit in which the plaintiff recovered said judgment, and at all times during the litigation of said suit, the plaintiff was not the real party in interest and did not own or have any interest in the alleged claim against the defendant therein sued upon and plaintiff in and during said litigation suppressed and concealed that fact from the court and from the defendant.

10. Relative to the defense that the judgment in the New York proceedings is not responsive to the issues

tendered by the pleadings, the court finds as a matter of fact from the evidence that such question was presented to the New York courts by the defendant in the proceedings in which the judgment was obtained.

B. Conclusions of Law.

1. Relative to the defense that the judgment in the New York proceedings is not responsive to the issues tendered by the pleadings, the court finds as a matter of law that since said question not only could have been but was presented to the New York courts in the proceedings in which the judgment was obtained, that the same may not be re-litigated here.

2. That the affidavit of Edward H. Titus filed in the Supreme Court of the state of New York, county of New York, (Finding of Fact No. 6), is properly admissible.

3. The court finds as a conclusion of law that the plaintiff herein is not the real party in interest in this action and has no right to maintain this action in his name.

4. That the plaintiff's judgment procured in the courts of New York was procured through fraud practiced upon the New York courts and upon the defendant, in that at the institution of the suit in which the plaintiff recovered said judgment, and at all times during the litigation of said suit, the plaintiff was not the real party in interest and did not own or have any interest in the alleged claims against the defendant therein sued upon and had no right to prosecute said suit on the same in his name.

5. That during said litigation in the courts of New York, the plaintiff suppressed and concealed the fact that

a person or persons other than himself owned the claims upon which suit was brought in his name and were the real parties in interest in whose name or names alone suit could be rightfully prosecuted.

6. That the said judgment so obtained in the state of New York was and is impeachable there for fraud and it was and is to the same extent impeachable in the courts of Ohio.

7. That the finding and judgment herein will be for the defendant.

Dated at Columbus, Ohio, this nineteenth day of September, 1936.

Charles A. Leach,
Judge of the Court of Common Pleas, Franklin County, Ohio.

APPENDIX B.

Assignments of Error Filed by Appellant With Court of Appeals, Franklin County, Ohio.

1. The court erred in rendering judgment for the defendant instead of the plaintiff.

2. The judgment is contrary to law.

3. The judgment is against the manifest weight of the evidence.

4. The court erred in overruling the plaintiff's motion for judgment in his favor at the close of all the evidence.

5. The court erred in its conclusion of law No. 2, to wit: "that the affidavit of Edward H. Titus filed in the Supreme Court of the state of New York, county of New York (finding of fact No. 6) is properly admissible" and admitting said affidavit (Defendant's Exhibit No. 7) in evidence over the objection of plaintiff.

6. The court erred in its conclusion of law No. 3, that "the plaintiff herein is not the real party in interest in this action and has no right to maintain this action in his name."

7. The court erred in its conclusion of law No. 4, to wit: "that the plaintiff's judgment procured in the courts of New York was procured through fraud practiced upon the New York courts and upon the defendant, in that at the institution of the suit in which the plaintiff recovered said judgment, and at all times during the litigation of said suit, the plaintiff was not the real party

in interest and did not own or have any interest in the alleged claims against the defendant therein sued upon and had no right to prosecute said suit on the same in his name."

8. The court erred in its conclusion of law No. 5, that "during said litigation in the courts of New York, the plaintiff suppressed and concealed the fact that a person or persons other than himself owned the claims upon which suit was brought in his name and were the real parties in interest in whose name or names alone suit could be rightfully prosecuted."

9. The court erred in its conclusion of law No. 6, that "the said judgment so obtained, in the state of New York was and is impeachable there for fraud and it was and is to the same extent impeachable in the courts of Ohio."

10. The court erred in its finding of fact No. 8 in that said finding is based upon incompetent, irrelevant and immaterial evidence, to wit, Defendant's Exhibit No. 7, and such finding is contrary to the manifest weight of the evidence.

11. The court erred in its finding of fact No. 9, to wit, that "at the institution of the suit in which the plaintiff recovered said judgment and at all times during the litigation of said suit, the plaintiff was not the real party in interest and did not own or have any interest in the alleged claim against the defendant therein sued upon and plaintiff in and during said litigation suppressed and concealed that fact from the court and from the defendant"—and such finding is contrary to the manifest weight of the evidence.

12. The court erred in overruling plaintiff's motion
r a new trial.

13. The court erred in failing to find, though re-
uested by plaintiff in writing, "whether a reassignment
the claim was made by Walter L. Titus to Edward H.
itus on December 1, 1925."

14. The court erred in failing to find, though re-
uested by plaintiff in writing, whether the defendant
ad knowledge of the reassignment from Walter L.
itus to Edward H. Titus.

APPENDIX C.

Motion for New Trial in Trial Court

Plaintiff moves the court for an order setting aside the decision heretofore rendered in this case and granting a new trial, for the following reasons, to wit:

1. The decision of the court is against the weight of the evidence and contrary thereto.

2. The decision of the court is contrary to law.

3. The court erred in the admission of evidence over the objection and exception of plaintiff.

4. The court erred in excluding evidence offered by plaintiff to which objection was made and exceptions were taken.

5. The court erred in overruling plaintiff's motion for judgment at the close of defendant's case.

6. The court erred in overruling plaintiff's motion for judgment at the close of all of the evidence.

7. Other errors of law occurring at the trial of said cause prejudicial to the rights of plaintiff and by which plaintiff was prevented from having a fair trial.

8. The decision is not sustained by sufficient evidence and is contrary thereto.

Plaintiff moves the court for a judgment in his favor notwithstanding the decision of the court.

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Supreme Court of the United States

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EDWARD E. TETOR,

Petitioner,

vs.

LEE C. WALLICK,

Respondent.

[redacted]

ANSWER [redacted] OF LEE C. WALLICK, RESPONDENT.

[redacted]

WILLIAM M. SUMMER,
[redacted] E. Broad St., Columbus, Ohio,
Attorney for Respondent.

[redacted]

ROBERTS LAW REPORTING COMPANY, Cincinnati, Ohio.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 188.

EDWARD H. TITUS,

Petitioner,

vs.

LOU C. WALLICK,

Respondent.

ANSWER BRIEF OF LOU C. WALLICK, RESPONDENT.

STATEMENT OF CASE.

We cannot agree with a number of the conclusions drawn by petitioner. Hence, we feel impelled to set forth a brief history of this litigation and the issues and facts involved as we understand them. Bold-faced type is ours excepting where otherwise noted.

The Pleadings and the Trial in the Court Below.

The issues are joined on the petition, amended answer, amendment to amended answer and the reply to the amended answer.

The petition (R., 7) sets forth a judgment of three hundred eighty-nine thousand one hundred three dollars and twenty-one cents ($389,103.21) alleged to have been recovered in the Supreme Court of New York county, state of New York. An exemplified copy of the judgment is annexed to the petition. (R., 19.)

The amended answer of the defendant sets up defenses as follows (R., 40):

1. The judgment in the New York proceedings is not responsive to the issues tendered by the pleadings.

2. The plaintiff in the action at bar, in Franklin county, Ohio, is not the real party in interest.

3. The judgment in the New York proceeding was procured through fraud practiced upon the New York court and upon the defendant, in that the plaintiff was at no time, from the very institution of the suit, the real party in interest and surreptitiously suppressed that fact.

4. A general denial.

The amendment to the amended (R., 41) answer pleads the New York real party in interest statute, which was in force at the time of the institution of the proceeding in New York and has continued in force since that time.

The reply (R., 43) admits the allegations of the amendment to the amended answer and alleges that all matters

set up in the amended answer were adjudicated in the New York proceeding.

The cause came on for trial in the Court of Common Pleas, Franklin county, Ohio (Columbus), before Honorable Charles A. Leach, January 20, 1936. A jury was waived with consent of the court. The evidence offered at the trial consisted entirely of documentary evidence. At the trial the plaintiff asked permission to take depositions in New York to prove delivery of Plaintiff's Exhibit D, and permission to take such deposition was granted. (R., 60, 61.)

The opinion of Judge Leach of the trial court (R., 148) was announced April 21, 1936. Thereafter, the plaintiff filed a motion requesting the court to state in writing the conclusions of fact found separately from the conclusions of law. (R., 158.) The court complying with that request, found that the issues raised by the first defense (that the judgment in New York was not responsive to the issues) could not be relitigated; **that the plaintiff was not the real party in interest in the action at bar and had no right to maintain this action in Ohio in his name**; and that the plaintiff practiced a fraud upon the New York courts and upon the defendant (the respondent at bar) in the procurement of the judgment and therefore the judgment is impeachable in this action. (R., 160.)

History of the New York Case.

The New York case was instituted December 22, 1925, by the filing of a complaint and the issuing of summons.

The plaintiff primarily was claiming the ownership of two hundred and fifty shares (250) shares of the common stock of The Secor Hotel Company, of Toledo, Ohio, an Ohio corporation, which two hundred and fifty (250) shares represented a one-fourth (¼) interest in the company and which two hundred and fifty (250) shares plaintiff claimed he owned by virtue of an oral promise (R., 108) made in 1906, nineteen (19) years before the suit was brought. The plaintiff in addition to his claim for the recovery of said shares asked for relief in the way of an accounting against the defendant for dividends or other sums received by the defendant to which the plaintiff claimed to be entitled by reason of his ownership of said shares.

The first trial before Justice Proskauer resulted in a dismissal of the plaintiff's complaint. (R., 108.)

The plaintiff then appealed to the Appellate Division. The Appellate Division on the printed record proceeded to reverse the trial court who had seen and heard the witnesses and the Appellate Division did not order a new trial but rendered judgment for the plaintiff for the recovery of the two hundred and fifty (250) shares of stock and directed an accounting of sums received as dividends or otherwise by the defendant, applicable to said shares. (R., 93.)

Thereafter, an order was issued appointing Joseph Kahn, Esquire, to take the accounting. (R., 91.)

The accounting continued to January, 1929.

In January, 1929, the defendant discovered (R., 91) that the plaintiff had fraudulently and surreptitiously suppressed evidence. That is, on November 23, 1925, the plaintiff, Edward H. Titus, and one London I. Wallick, estranged brother of the defendant, drafted and executed a written agreement whereby the plaintiff, Edward H. Titus, agreed to prosecute this claim against the defendant and then if the plaintiff was not successful, London I. Wallick was to prosecute some alleged claim of his against the defendant and then they were to share fifty-fifty in the results of either action. (R., 93.) The plaintiff had, on the original trial, been questioned as to whether or not he had made any agreement with London I. Wallick about the case or about the claims and he absolutely denied that any such agreement had been made. (R., 104.) **The defendant on this ground moved for a vacation of the judgment and for a new trial and the trial court held that the plaintiff, Edward H. Titus, had perpetrated a fraud upon the court.** (R., 101.) **The judgment was vacated long after term.** (R., 88.)

The second trial of the New York case in December, 1930, again resulted in a dismissal of the complaint. (R., 120.)

Thereupon, the plaintiff appealed to the Appellate Division and the Appellate Division, again upon the printed record reversed the trial court, rendered judgment of ownership in the plaintiff of the stock and ordered an accounting. (R., 129.)

Thereupon, the defendant appealed to the Court of Appeals which affirmed the Appellate Division without opinion. (R., 80.)

On May 11, 1932, an order of reference was made appointing Edmund McCarthy, Esq., to take the accounting.

McCarthy in his report of February 24, 1933, found no sums due from the defendant to the plaintiff. (R., 115.)

Thereafter, the referee's report was refused by the trial court (R., 114) and a second referee, Jeremiah T. Mahoney, was appointed by the Appellate Division. (R., 134.)

Referee Mahoney thereafter made a finding that the defendant had "wrongfully" withdrawn or caused to be withdrawn, (by way of alleged incorrect accounting in amortizing a lease, alleged excessive salaries to officers, alleged improper stock purchases, etc.) one million, fifty-nine dollars and twelve cents ($1,000,059.12) from the funds of The Secor Hotel Company to which he added five hundred and eleven thousand, two hundred and twenty-six dollars and nine cents ($511,226.09) interest and then proceeded to find that the plaintiff was entitled to one-fourth (¼) of that amount directly from the defendant **entirely disregarding The Secor Hotel Company and the fact that it was not a party to the case.** (R., 135.)

The finding of Referee Mahoney was approved by the Supreme Court by opinion, the opinion being as follows:

> "The opinion of the learned referee in which he lucidly states the basis of every ruling he has made is a complete answer to every point made by the defendant in opposition to the motion to confirm the

report. The report is confirmed. Submit judgment. Dated April 13, 1934. E. J. McG." (R., 136.)

Thereupon, judgment was entered up against the defendant for $389,103.21. (R., 19.)

On appeal to the Appellate Division, the Appellate Division affirmed the Supreme Court. (R., 78.)

The petition in the case at bar was filed in the Common Pleas Court of Franklin county, Ohio, on August 20, 1934. (R., 1.)

The Affidavit, the Assignment and the Fraud.

In 1934 after the judgment sued on by plaintiff was recovered in the New York courts, London I. Wallick, estranged brother of Lou C. Wallick, the defendant, brought an action in New York against Edward H. Titus, the plaintiff herein, London I. Wallick claiming that he owned a one-half (½) interest in the judgment sued upon herein and asked for a temporary restraining order enjoining Edward H. Titus from disposing of the judgment or the proceeds. (R., 137.) London I. Wallick based his claim upon the aforesaid agreement between him and Edward H. Titus of November 23, 1925. In opposition to the application of London I. Wallick for that restraining order, Edward H. Titus, defendant therein and plaintiff herein, made an affidavit dated August 17, 1934, Defendant's Exhibit No. 7 (R., 137), which his attorneys filed September 7, 1934, in the New York case on behalf of Edward H. Titus, plaintiff herein.

Note: The petition at bar was filed August 20, 1934.

In said affidavit (Defendant's Exhibit No. 7) Edward H. Titus deposes as follows (R., 141):

> "I told him at that time (meaning November 23, 1925) that **I had already assigned any interest in the proceeds of said action against Lou C. Wallick to Walter L. Titus and Emilie F. Titus.**"

Edward H. Titus further deposes as follows (R., 145):

> "His retention of said sum of $2,500.00 is likewise consistent with my statement that the plaintiff herein knew in November, 1925, and prior to the execution of the instrument of November 23, 1925, **that I had assigned my interest in the case against Lou C. Wallick to Walter L. Titus and Emilie F. Titus.**"

Edward H. Titus deposes further as follows in said affidavit (R., 145):

> "The plaintiff's application for an injunction pendente lite should be denied. Prior to my execution of the instrument of November 23, 1925, **I assigned my interest in my claim against Lou C. Wallick to Walter L. Titus, my brother, and Emilie F. Titus, my wife.** The plaintiff herein knew of this assignment before the instrument of November 23, 1925, was executed. It is respectfully submitted that **it does not lie within the jurisdiction of this court to now enjoin what has already been accomplished.**"

This affidavit (Defendant's Exhibit 7) (R., 137), made in 1934, shows that Edward H. Titus has no interest whatever in this judgment and that he assigned away all of his interest in the claim prior to the time the suit was instituted in New York.

In connection with plaintiff's motion herein in the trial court to strike defendant's answer from the files, on the ground that it was a sham, defendant produced the said affidavit, Exhibit 7, and **then petitioner for the first time** produced the two instruments discussed by petitioner in his brief (Defendant's Exhibit 8 and Plaintiff's Exhibit D) (R., 32, 147, 83). The first instrument dated March 31, 1924 (R., 147), is an absolute assignment from Edward H. Titus to Walter L. Titus of the entire claim. The second instrument dated December 1, 1925 (R., 83), is a power of attorney from Walter L. Titus to Edward H. Titus, the purpose of which, as expressed in the third "whereas" paragraph, was an attempt to authorize Edward H. Titus to bring suit. An analysis of the instrument of December 1, 1925, is:

1. The instrument of December 1, 1925, is no more than a bare power of attorney to Edward H. Titus to collect the claim and to bring suit.

2. It expressly appoints Edward H. Titus "true and lawful attorney" for Walter L. Titus with powers of substitution.

3. It provides that Edward H. Titus will receive the stock and money **"as property of" Walter L. Titus** and will immediately endorse, deliver and transfer the same to Walter L. Titus.

4. If a trust has been created by the instrument of December 1, 1925, **the trustee is Walter L. Titus. If Edward H. Titus has any interest whatever in the judgment and claim, it is merely contingent.** The power of attorney was to authorize Edward H. Titus to bring an

action, nothing more, and the **power was not incidental to other powers or duties given to Edward H. Titus.**

However, the affidavit (R., 137) of Edward H. Titus of August 17, 1934, shows conclusively that he, Edward H. Titus, after his assignment to his brother, no longer had or claimed any interest in the claim. The affidavit denies that he has any interest in the claim or judgment.

As stated by Judge Hornbeck of the Court of Appeals for Franklin county, Ohio, in his opinion, concurred in by the remaining Judges Barnes and Geiger **the second instrument which was executed December 1, 1925,** just before the suit in New York was instituted, **gave the plaintiff, Edward H. Titus, no authority whatever under the New York law or under the Ohio law to prosecute the action in his name.** (R., 178, 189.)

At the institution of this case in the Common Pleas Court, Franklin county, Ohio, plaintiff was not the real party in interest. The trial judge made the following finding:

> "3. The court finds as a conclusion of law that the plaintiff herein is not the real party in interest in this action and has no right to maintain this action in his name." (R., 163.)

The Court of Appeals in its decision stated:

> **"With the finding that the plaintiff was not the real party in interest in the action in Ohio and in New York we are in accord upon a fair consideration of the status of the plaintiff, his brother and the defendant."** (R., 180.)

This finding by the trial court and affirmed by the Court of Appeals and undisturbed by the Supreme Court, constituted a local question of procedure involving the construction and interpretation of the procedural real party in interest statute of the state of Ohio and in no way involved the full faith and credit clause of the United States Constitution.

At the time of the institution of the New York case, plaintiff had assigned away his claim. Although the New York law required that the action be prosecuted in the name of the real party in interest, the plaintiff prosecuted the action in his name although he had no interest in the same and represented himself throughout the action to be the real party in interest and suppressed the fact that he was not. (R., 163, 189, 190, 107, 104, 119.)

On the witness stand in the case in the state of New York, Edward H. Titus testified and represented that he was the only one interested in the alleged claim. (R., 107.)

The trial court below, Judge Leach, made the following finding of fact (R., 163):

> "9. That at the institution of the suit in which the plaintiff recovered said judgment, and at all times during the litigation of said suit, the plaintiff was not the real party in interest and did not own or have any interest in the alleged claim against the defendant therein sued upon and **plaintiff in and during said litigation suppressed and concealed that fact from the court and from the defendant.**"

As conclusions of law the trial judge made the following findings (R., 164):

> "4. That the **plaintiff's judgment** procured in the courts of New York **was procured through fraud practiced upon the New York courts and upon the defendant**, in that at the institution of the suit in which the plaintiff recovered said judgment, and at all times during the litigation of said suit, the plaintiff was not the real party in interest and did not own or have any interest in the alleged claims against the defendant therein sued upon and had no right to prosecute said suit on the same in his name.
>
> "5. That during said litigation in the courts of New York, **the plaintiff suppressed and concealed the fact that a person or persons other than himself owned the claims** upon which suit was brought in his name and were the real parties in interest in whose name or names alone suit could be rightfully prosecuted.
>
> "6. That the **said judgment** so obtained in the state of New York was and **is impeachable there for fraud and it was and is to the same extent impeachable in the courts of Ohio.**"

After the decision of the trial court was announced plaintiff filed a motion for new trial, assigning certain errors. For some reason this motion has been omitted in printing the record. A copy of the motion is attached to this brief as Appendix A. No constitutional question is raised by those assignments.

In appealing to the Court of Appeals in Ohio it was necessary for plaintiff to specify the claimed errors to be reviewed. No constitutional question is raised by those assignments. (R., 176.)

When this case came to the attention of the Supreme Court of Ohio, no constitutional question had been properly raised and there was no basis for review on that ground. And since the Supreme Court of Ohio had in **Brown v. Ginn**, 66 O. S., 316, construed the real party in interest statute (a purely local question) squarely on the points raised, there remained nothing for the Ohio Supreme Court to review. Hence the motion before it, to certify up the record, was properly denied.

Issues at Bar Below.

The issues were three in number as follows:

I. The purported judgment in the New York proceedings is not responsive to the issues tendered by the pleadings, nor to the matters actually controverted.

II. **The plaintiff in the action at bar in the Common Pleas Court, Franklin county, Ohio, was not the real party in interest.**

III. The purported judgment in the New York proceeding was procured through fraud practiced by the plaintiff upon the New York court and upon the defendant in that plaintiff was at no time the real party in interest and he surreptitiously suppressed and concealed that fact.

The trial court found against the defendant on the first issue. The trial court found in favor of the defendant on the second and third issues and the trial court was affirmed by the Court of Appeals, in which affirmance the three judges of the Court of Appeals concurred. The Supreme Court of Ohio refused to review.

The action was for a personal judgment against the defendant, predicated on the pleaded judgment obtained in New York. The federal Constitution, of course, provides that full faith and credit shall be given in each state to the judicial proceedings of every other state. There is no debatable question about that. The issues, however, were, second, whether plaintiff could sue in his name in an Ohio court, and, third, whether or not the plaintiff had procured the judgment in the New York courts through practicing fraud on the court and on the defendant in the procuring of the judgment. **The second issue was a local question.**

As to the third issue, **if the fraud was practiced on the court and on the defendant in the procuring of the judgment, then the plaintiff has no judgment to which any faith or credit is to be given. There is no debatable or substantial question about that. The trial court held as a matter of fact that the plaintiff had practiced a fraud on the defendant and on the New York court in procuring the New York judgment,** and the trial court found as a matter of law that for that fact the judgment is impeachable in New York as well as elsewhere. **The Court of Appeals properly affirmed these findings by a unanimous decision.** The third from the last paragraph of the opinion of the Court of Appeals is as follows:

> "It is our judgment that the trial court properly applied the law in the determination that the plaintiff suppressed and concealed from the court and from the defendant the fact that he was not a proper party plaintiff and the real party in interest in the action against the defendant in New York, and in finding that such conduct was extrinsic fraud in prosecuting the cause to judgment, which supported the third defense of the answer." (R., 190.)

ARGUMENT.

SUMMARY OF ARGUMENT.

Proposition I. There is an independent ground of state procedure as the basis of the decisions below involving no federal question, and broad enough to sustain the judgment.

Proposition II. The trial court, sitting as a jury, found that the plaintiff as such in the Ohio court, was not the real party in interest under the Ohio statute. The trial court found further that the plaintiff in the New York proceeding had perpetrated a fraud upon the New York courts and upon the defendant in obtaining the alleged judgment sued upon in Ohio. These facts were not disturbed by the reviewing courts of Ohio.

Proposition III. Where fraud is practiced by a party in procuring a judgment, the judgment is assailable on that ground in a sister state and without first making application to the court rendering the judgment.

PROPOSITION I.

The Ohio Courts Decided Against the Petitioner on an Independent Ground of State Procedure.

This court in the case of **Gaar, Scott and Company v. Shannon**, 223 U. S., 468 at 470, lays down the following rule:

> "For as repeatedly ruled, where a state court has decided against the plaintiff in error on a matter of

> general law broad enough to sustain the judgment, this court will not consider the federal questions, even though they may have been actually considered and determined adversely to his contention."

And in **Hammond v. Johnson**, 142 U. S., 73 at 78, the court had earlier made the following observation:

> "It is well settled that where the Supreme Court of a state decides a federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a federal question and broad enough to maintain the judgment, the writ of error will be dismissed without considering the federal question."

The plaintiff petitioner in the Common Pleas Court of Franklin county, Ohio, started this action by filing a petition against the defendant asking for a money judgment.

The procedural statute of Ohio provides that an action must be prosecuted in the name of the real party in interest.

Section 11241 of the **Ohio General Code** is as follows:

> "An action must be prosecuted in the name of the real party in interest, except as provided in the next three succeeding sections. When a party asks that he may recover by virtue of an asignment, the right of set-off, counter-claim, and defense, as allowed by law, shall not be impaired."

Section 11244 of the **Ohio General Code** is as follows:

> "An executor, administrator, or guardian, a trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or a person expressly authorized by statute,

may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law."

These sections of the Ohio statutes had been construed by the Supreme Court of Ohio prior to the institution of the action at bar and particularly in the case of **Brown v. Ginn**, 66 O. S., 316.

To the petition of the plaintiff petitioner, the defendant in the trial court, pleaded a separate and distinct defense that the plaintiff was not the real party in interest and therefore could not prosecute this action in Ohio in his name. The trial court on the evidence, and sitting as a jury by consent of the parties, found that the plaintiff was not the real party in interest in the action at bar under the law of the forum, and therefore, could not maintain this action in his name. This question was one of local procedure under the state statutes and as construed by the decisions of the Supreme Court of Ohio. The trial court on this question was affirmed by the Court of Appeals for Franklin county, Ohio, and the Supreme Court of Ohio refused to review.

In the assignments of error, filed in the Court of Appeals for Franklin county, Ohio, no federal question was raised. (R., 176.) The errors assigned are characterized by that court in the fourth paragraph of its opinion as follows:

"There are fourteen errors assigned, which may be grouped under the general headings that **the judgment is contrary to law and against the manifest weight of the evidence**; the court erred in admitting

> certain evidence; in the conclusions of law and fact and in refusing to find 'whether a reassignment of the claim (upon which the judgment in New York was rendered) was made by Walter L. Titus to Edward H. Titus on December 1, 1925.'" (R., 179.)

After the Court of Appeals had concurred in the findings of the trial court and in the legal conclusions reached by the trial court, the plaintiff petitioner took two courses of procedure in going to the Supreme Court of Ohio: first he filed a motion in the Supreme Court of Ohio asking for an order "directing said Court of Appeals to certify its record to the Supreme Court" on the ground "that said case is one of both public and general interest" within meaning of Article IV, Section 2 of the Ohio Constitution, and with that motion he filed assignments of error in which for the first time, the plaintiff petitioner specifically claimed that a federal question was involved in the way of violation of the full faith and credit clause of the United States Constitution; second, the plaintiff filed in the Supreme Court of Ohio an appeal as of right on the ground that "a debatable constitutional question" was involved. The defendant respondent then filed a motion to dismiss the appeal as of right. The Supreme Court of Ohio, without opinion, dismissed the appeal taken as of right and overruled the motion to certify.

Either of two propositions of local Ohio law would have disposed of the appeal as of right in the Supreme Court of Ohio:

> "If the constitutional question claimed to be involved in the case is not submitted to or decided by

the Court of Appeals, the motion to dismiss should be sustained."

Hoffman v. Staley, 92 O. S., 505,

"If the record * * * does not show that the disposition of the case requires the consideration of any constitutional question, it will be dismissed for want of jurisdiction."

2 O. Jur., 63.

As to the motion to certify, there was no question of public or general interest for the consideration of that court for the very good reason that the Supreme Court of Ohio had previously in Brown v. Ginn, supra, decided the procedural question involved and consequently that question was foreclosed against the plaintiff petitioner.

Hence it does not appear that the Supreme Court of Ohio dealt with any federal question, but on the contrary, based its ruling on the question of local procedure.

In this connection we quote from Volume 5 of Hughes Federal Practice, page 315:

> "A federal question, although referred to in the assignments of error in the state appellate court and in the Supreme Court of the United States, cannot be considered by the latter where it does not appear that the state court dealt with the question, and where it appears that the state court may have refused to deal with it on the ground that it was not raised in the trial court."

This court in the case of **Whitney v. California**, 274 U. S., 357 at 360, spoke as follows:

> "It has long been settled that this court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a federal question constituting an appropriate ground for such review was presented in and **expressly or necessarily decided by such state court.**"

No federal question was **expressly** decided by the Supreme Court of Ohio and no federal question was **necessarily** decided by the Supreme Court of Ohio for there was an independent ground for the decision of the trial court as well as of the decision of the Court of Appeals for Franklin county which ground involved no federal question, and hence the Supreme Court of Ohio could have disposed of and in all probability did dispose of the case on that independent ground which involved no federal question.

Where it does not appear upon which of two grounds the decision was based, whether the federal or non-federal ground, then if the independent ground on which it might have been based was a good and valid one, sufficient to sustain the judgment, this court will not assume jurisdiction.

Klinger v. Missouri, 13 Wall., 257.

PROPOSITION II.

The Decisions of the State Courts Rest Upon a Finding of Facts Made by the State Trial Court.

In the case at bar the trial judge sitting as a jury with the consent of the parties, made a finding of facts at the special written request of the plaintiff petitioner. It was found from the evidence that the plaintiff petitioner was not the real party in interest in the Ohio court. It was also found that the judgment sued upon was procured through fraud practiced upon the defendant and upon the New York courts by the plaintiff petitioner. The Court of Appeals for Franklin county, Ohio, weighed the evidence and stated in its opinion that it was in accord with the findings of the trial court. Ample evidence supports those findings.

This court in the case of **Ry. Co. v. Donaldson, Administrator**, 246 U. S., 121 at 124, spoke as follows:

> "The record shows testimony supporting the verdict, and that is as far as this court enters upon a consideration of that question."

PROPOSITION III.

Where Fraud is Practiced by a Party in Procuring a Judgment, the Judgment is Assailable on that Ground in a Sister State and Without First Making Application to the Court Rendering the Judgment.

In the first trial of the New York case the plaintiff petitioner testified that he was the only one interested in the case. (R., 108.) Long after judgment against the defendant pursuant to the first trial there, in the New York courts, the defendant discovered that plaintiff and London Wallick, estranged brother of defendant, had prior to the institution of the New York suit, entered into a fifty-fifty split agreement to divide the proceeds of the New York suit and further that if the plaintiff was unsuccessful, then London Wallick would start some kind of a suit against the defendant and Titus would share fifty-fifty in the proceeds of that litigation. (For fifty-fifty agreement see R., 104.)

Justice Valente, on motion of defendant for a new trial in the New York Supreme Court, held that the plaintiff had in suppressing this fifty-fifty agreement, practiced fraud upon the court and upon the defendant and he set the judgment aside. (R., 90.)

Then on the second trial, the plaintiff in half truths and by misleading testimony, knowing that counsel for defendant was under the mistaken impression that some kind of an agreement had been made after the New York

suit had been filed, suppressed the fact of his assignment to his brother which had been made twenty-one (21) months before the New York litigation had been started. (R., 119.)

Then in 1934 at the time the action at bar was started in Ohio, the plaintiff filed his affidavit, Defendant's Exhibit 7 (R., 137), in the London Wallick action in New York for injunction, in which affidavit the plaintiff deliberately states that prior to November 23, 1925, he had assigned away all of his interest in the claim, to his brother and wife and that he, the plaintiff, **no longer had any interest in the judgment or in the claim.**

When the plaintiff was confronted in the Ohio court with the affidavit, then plaintiff came forward for the first time with the assignment, Defendant's Exhibit 8, and the writing, Plaintiff's Exhibit D. (R., 32.)

Then the plaintiff proceeded to contend that in spite of the affidavit and the assignment he was still and always had been the real party in interest, and that any way the matter was res judicata even though the plaintiff had suppressed the fact and defendant had not discovered it. This contention has been made by counsel and not personally by petitioner who has not dared to attempt an explanation from the witness stand.

Judge Leach of the trial court in his opinion, stated it was not necessary for him to determine whether or not Defendant's Exhibit D (R., 83), constituted a reassignment, for subsequent to the date thereof, the plaintiff filed the affidavit (R., 137) in the London Wallick case, which in substance stated that it was beyond the power

of the court to enjoin him from disposing of, encumbering, pledging, assigning, or in any manner dealing with the moneys received or to be received on account of the judgment in his favor against Lou C. Wallick, the thing had been done, he says, before the injuction had been sought, and he himself states this to be the fact.

Quoting the decision of Judge Leach again (R., 156): "But the affidavit says by way of deliberate and inescapable implication that prior to November 23, 1925, he had assigned his claim to his brother and to his wife, and that on the date of the affidavit, such assignments were in effect."

The trial court could find no explanation of the affidavit and the trial court found from the evidence that the judgment upon which this action is based "was obtained by fraudulently concealing from the court in which the judgment was obtained, the facts contained in the affidavit, and such judgment would be impeachable there for such fraud." (R., 156.) The judgment being impeachable for fraud in New York on this ground, of course, is impeachable in Ohio and the trial court so found.

If it had been necessary for the trial court in the case at bar to have determined the legal effect of Plaintiff's Exhibit D, the court on the facts and the law would have had to have found as the Court of Appeals did find that Exhibit D was not such an instrument as would permit the plaintiff to maintain the New York action in his own name. The apparent purpose of Exhibit D was an attempt to permit the plaintiff to maintain this action

in his name and for an ultimate purpose to conceal from the court and from the defendant the fact that the plaintiff had no interest of any kind in the alleged claim against the defendant. If such an instrument would permit an "assignee" to prosecute and maintain an action in the name of the "assignee" then the real party in interest statutes of New York and Ohio mean nothing. We have analyzed Exhibit D, supra, page 9.

One way to characterize the issue in this case is to put it this way: may a party for his benefit, say to one court, "I have no interest in this claim or judgment," and at the same time say to the court of the sister state, "the claim and judgment is mine." This is a simple proposition as to whether or not there is any rule of good words and whether a party may at his whim repudiate and deny that which he has solemnly stated and that which his written documents bear out.

Briefly, we call attention to the New York law on the question of the New York real party in interest statute. Section 210, **Civil Practice Act of New York**, pleaded in amendment to amended answer and admitted by plaintiff in reply, is as follows:

> "Section 210. Action to be brought in name of real party in interest. Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, a person with whom or in whose name a contract is made, for the benefit of another, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted."

Spencer v. Standard Chemicals & Metals Corporation

143 N. E., 651; Ct. of App. N. Y., 1924 (237 N. Y., 479):

"Syllabus 1. Under Code Civil Procedure Sections 111, 113 (Civil Practice Act, Section 210), assignee must have legal or equitable title to thing assigned to sue in his own name as real party in interest, irrespective of consideration paid, purpose of assignment, or use to be made of proceeds collected.

"Syllabus 2. One empowered by instrument to prosecute suits for recovery of debts, etc., due the maker, in name of either, held not trustee of express trust, or assignee of legal title or equitable interest, but mere attorney in fact, not authorized to sue in his own name as real party in interest, under Civil Practice Act, Section 210."

Page 652: "Andrews, J. When we adopted our scheme of reformed practice, one purpose being to end in part the ancient distinctions between law and equity, we provided that every action must be prosecuted in the name of the real party in interest. Code of Procedure, Section 111. A few exceptions were made. A trustee of an express trust, for instance, might still sue without joining with him the person for whose benefit the action is prosecuted and later such a trustee was defined to include one with whom or in whose name a contract is made for the benefit of another. Code of Procedure, Section 113. Theretofore, as the commissioners on practice and pleadings pointed out in their report, if the assignee sued at law he was turned out of court, and if the assignor sued in equity he was turned out also. So the rule adopted in courts of equity was made general, 'that he who has the right is the person to pursue the remedy.' First Report, page 124. It was not the design to give a new cause of action where none previously existed, but to permit and require the beneficial owner to enforce his rights in his own name.

"The real party in interest has been defined by this court: 'If, as between the assignor and the assignee, the transfer is complete, so that the former is divested of all control and right to the cause of action, and the latter is entitled to control it and receive its fruits, the assignee is the real party in interest.' Cumings v. Morris, 25 N. Y., 625.

"In other words, the plaintiff must have some title, legal or equitable, to the things assigned. Hays v. Hathorn, 74 N. Y., 486. If the assignee have such title it is enough. The consideration paid, the purpose of the assignment, the use to be made, of any proceeds collected, is immaterial. Allen v. Brown, 44 N. Y., 228; Meeker v. Claghorn, 44 N. Y., 349; Sheridan v. Mayor, etc., of New York, 68 N. Y., 30; Brown v. Powers, 53 App. Div., 251, 65 N. Y. Supp., 733. But legal title or equitable interest he must have.

"This action is brought by Harold R. Spencer to recover the balance of the purchase price of certain ore said to have been sold by one Quan Kai to the defendant. It was alleged in the complaint that the cause of action had been duly assigned to the plaintiff. This was denied. At the close of the plaintiff's case the purported assignment was offered in evidence. This instrument named Spencer as attorney for Quan Kai, and gave him, among other things, 'power to commence or prosecute any suit or action or other legal proceedings for the recovery of damages, * * * debts, demands, choses in action, causes or things whatsoever in the United States of America due or to become due to me and to prosecute and follow and discontinue the same if he shall deem it proper and for me and in my or his name to take all steps and remedies necessary and proper for the recovery * * * of any * * * sum or sums of money, choses in action or other things whatsoever that is, are, or shall be by my said attorney thought to be due * * * to me in my right or otherwise, and also for me and in my name to compromise, settle, and

adjust all causes. The attorney was also authorized to sign any release or receipt and he was given power to substitute other attorneys in his place. When this instrument was offered in evidence objection was made that it was not competent because it did not constitute an assignment but was a mere power of attorney. The attention of the trial judge was therefore sharply called to this question. The paper was received in evidence and an exception taken.

"The plaintiff is clearly not within any of the definitions of the trustee of an express trust. No legal title to the claim against the defendant was assigned to him. Neither does it appear that he has any equitable interest therein. **Upon the face of the paper the attorney's duty is simply to collect what may be due to Quan Kai solely for the latter's benefit and to transmit it to him.** It is the ordinary case of the appointment of an attorney in fact. **The attempt to authorize such attorney to sue in his own name is**, under the provisions of Section 210 of the Civil Practice Act, which in this respect follows the original code, **entirely unavailing.**"

Banca v. Clarkson, 274 N. Y., 69, cited by counsel, is not helpful for the reason that the facts and circumstances of the agreement before the court do not appear from the reported opinion. The court stated that from the record the plaintiff was trustee of an express trust.

The Supreme Court of Ohio has considered this situation in **Brown v. Ginn**, 66 O. S., 316, in construing the Ohio real party in interest statute which is similar if not identical to the New York statute. At pages 322 et seq. the Ohio Supreme Court has this to say:

"And we conclude further that in order to constitute the party a trustee of an express trust within

the meaning of Section 4995, **the right and duty to bring an action must be incidental to other powers and duties under the assumed trust**, and the authority not confined simply to the bringing of an action to collect the subject of the contract which purports to create the trust, and pay the net proceeds over to the assignor. **Such a contract is rather one of agency**; it is not one which creates an express trust within the meaning of this statute."

The rule in Brown v. Ginn is affirmed in Hadden v. Rowe (Sup. Ct. of Ohio), 3 O. O., 68, 70.

The case at bar is even stronger than the case of Brown v. Ginn. The instrument of March 21, 1924, is an absolute assignment to Walter L. Titus. The instrument of December 1, 1925, is an instrument of agency naming Edward H. Titus agent for Walter L. Titus to collect the claim and, if necessary, bring suit. **As soon as the stock or money, or both, should be recovered, Edward is to immediately turn the same over to Walter "as property of" Walter.** Hence **under this arrangement, Edward does not have even a contingent interest.** Edward is certainly not the **real** party in interest. Edward is not a trustee under any express trust for as in Brown v. Ginn he is to immediately deliver the proceeds over to Walter. To constitute Edward a trustee, the right and duty to sue, must be incidental to other powers and duties under the assumed trust. Here the right to sue is **the** power and duty delegated. If the instrument of December 1, 1925, creates a trust, the trustee is not Edward, but Walter. Walter is the person who is to administer the "corpus," not Edward. If a person can be

authorized to bring suit in his name on the basis of such a paper as that of December 1, 1925, then the real party in interest statutes mean nothing.

Now, reading the affidavit in the light of Exhibits 8 and D, the conclusion cannot be escaped that Edward, the plaintiff, had no interest in the alleged claim after a date prior to the institution of the New York litigation and that at the time this action was instituted in the Common Pleas Court of Franklin county, Ohio, the plaintiff was not the real party in interest or a trustee within contemplation of the real party in interest statutes.

Petitioner in his brief, top of page 12, starts off with a proposition taken from **Freeman on Judgments, Fifth Edition**, and from that proposition weaves his argument. The mistake which the petitioner has made is that he is quoting from that portion of Freeman's work which deals with **domestic judgments** as distinguished from sister state judgments. Freeman annotates authorities holding that in the forum where the judgment is procured, the attack on that judgment must be made in accordance with the local procedure and not collaterally. "The law of every jurisdiction prescribes the manner in which litigants must proceed to correct, vacate, review or annul judicial decisions." Section 306 of Freeman. (However, as the author points out, there are cases where **domestic** judgments have been successfully attacked collaterally in their forum on the ground of fraud in the procurement.) This rule which Freeman says applies to domestic judgments and which the petitioner mistakenly relies upon is quite different as to sister state judgments,

the author, **Freeman, Fifth Edition, Section 1401,** rly distinguishes: **"Notwithstanding the contrary as applied to domestic judgments,** many cases either l or contain dicta to the effect that **sister state and ign judgments may be attacked collaterally for ud** * * *. If it is impeachable there (where rendered) fraud it is to the same extent impeachable elsewhere." nd from Section 1402, page 2893 of **Freeman's** work quote the following which we deem very helpful:

"While the United States Supreme Court has indulged in dicta to the effect that such a judgment may be attacked for fraud, as well as lack of jurisdiction, other dicta of the same court are to the contrary, and some of its decisions contained the general statement that the plea of fraud is not available as an answer to an action on a judgment. We apprehend, however, that **these latter decisions are inapplicable in those states in which the distinction between law and equity is attempted to be abolished, and equitable as well as legal defenses are, when properly pleaded, admissible in actions at law."**

he last sentence in the above quotation is particularly licable to the situation at bar. For instance, this rt in **Christmas v. Russell,** 72 U. S., 290, further comted upon infra, seemed to think that an attack of the ure made at bar would have to be raised on the chan- side. However, in Ohio we now have no chancery , no distinction between equity and law. Section 5 of the Ohio General Code is as follows:

"The defendant may set forth in his answer as many grounds of defense, counter-claim and set off as he may have, whether such as heretofore have been denominated legal or equitable, or both * * *."

In Ohio practice, subject matter which could be the basis of a bill in equity may be set up purely as a plea in defense. **Raymond v. Railway Co.**, 57 O. S., 271, at 28[illegible]:

> "Nor can it be reasonably claimed that the plaintiff's case is changed, or in any way aided, by the answer. That pleading, besides general denial and plea of the statute of limitations, sets up an equitable defense by way of estoppel. But it is common knowledge that this may be done under our statutes, Sections 5071 and 5782. It seems equally well settled that, unless a new, affirmative case is made by the defendant which requires a trial in advance of a trial on the plaintiff's cause of action, and, if found in favor of the defendant, would wholly supersede plaintiff's claim, the trial of the case made by the plaintiff is not affected. The equitable plea in this answer is a defense merely. If found in favor of the company, the effect would be simply to defeat a recovery."

This court in **Cole v. Cunningham**, 133 U. S., 107, at 112, refers with approval to the proceeding in Dobson v. Pearce, 12 N. Y., 156, where the plaintiff in a judgment recovered in New York, brought an action upon it in Connecticut, whereupon the defendant filed a bill against the plaintiff on the equity side of the same court, alleging that the judgment was procured by fraud and praying relief. The equity suit was litigated and the judgment creditor was enjoined from prosecuting the judgment. He assigned the judgment but in a suit by the assignee in New York it was held that the Connecticut decree was conclusive, that the judgment was obtained by fraud. Thus is demonstrated what Freeman says (in regard to the sometime state[illegible] rule that a plea

of fraud is not available as an answer to an action on a judgment), that the rule is not applicable in those states in which the distinction between law and equity is attempted to be abolished. Under the Ohio practice the defendant was not required to file a separate bill in equity for the simple reason that under the Ohio practice the subject matter of the equitable bill was properly set up as a defense to the action at law. See Kingsbrough v Tonelli 0.S.450 ab.

The petitioner makes further what seems to us to be a violent assumption in making his argument to wit, that the attack on the judgment at bar is a collateral attack. It is not always an easy matter to determine whether an attack is direct or collateral. If the object of a proceeding is incidental to the judgment, an attack on the judgment in that proceeding then is collateral. **Freeman**, page 607. However, in the case at bar the object of the proceeding according to counsel (page 2 of petitioner's brief) was "for the purpose of making the judgment of the Supreme Court of the state of New York a judgment in the state of Ohio." The attack was an affirmative answer to the effect that the New York judgment was of no force because it was procured through fraud. This it seems to us is a direct, not a collateral attack. If the procedure followed would have been as described in the case of Dobson v. Pearce above referred to herein and commented upon by this court in Cole v. Cunningham, a separate bill in equity would have been filed, and this would have constituted a direct attack. However, under the Ohio practice the subject matter of the bill in equity was properly set up as a defense to the action at law

based upon the judgment. Consequently, we submit that this was a direct attack upon the judgment.

On the impeachability of a foreign judgment, the general rule is stated in 15 R. C. L., page 935, as follows:

> "But **the weight of authority today is that a judgment of another state**, relied on as a cause of action, **may be impeached on the ground that it was obtained by fraud**, unless the parties raising the question of fraud are estopped from availing themselves of it by reason of participation in such fraud."

The court of last resort of the state of New York in **Gray v. Richmond Bicycle Company**, 167 N. Y., 30, recognizes that application need not be made to the court rendering the judgment in order to assail the same on the ground of fraud in the procurement thereof. The following is syllabus three of that case:

> "Relief from fraudulent foreign judgment may be granted by courts of this state. **Relief may be obtained from the judgment, if fraudulent, without the application to the courts of the other state**, and it cannot be indirectly enforced as a bar to the action, since a court of this state may, where it has jurisdiction of the parties, determine the question whether a judgment between them, rendered in another state, was obtained by fraud, and, if so, may enjoin the enforcement of it, although its subject-matter is situated in such other state."

A judgment may be attacked any time, anywhere, for fraud practiced as in this case in prosecuting the action. This is well recognized in the above New York case as well as in **Martin Corley, infant by Walter Duncan, his Guardian ad litem, v. New York and Harlem Railroad**

Company, App. Div. Sup. Ct. of N. Y. 1896; 12 App. Div. (N. Y.), 409, pages 410-411:

"On the ground of fraud practiced upon the court and jury during the trial, the judgment should be set aside and a new trial granted. It was said in Ward v. Town of Southfield (102 N. Y., 287) by Earl J.: 'A party defeated in a litigation may appeal from the judgment or move for a new trial, and, in a proper case, to vacate and set aside the judgment. These remedies are generally ample to protect all parties. But where there is fraud not in the subject of litigation, not in anything which was involved in the issue tried, but fraud practiced upon a party, or upon the court during the trial, or in prosecuting the action, or in obtaining the judgment may be attacked collaterally, and on account thereof set aside and vacated.' This is a case of 'fraud practiced upon a party * * * during the trial'; and if it is ground for a collateral attack, it is certainly ground for setting aside the judgment in the same action, as the Ward case plainly indicates. That case was cited and applied to the case of a motion in the same action, in Harris v. Ditson (13 N. Y. St. Repr., 337), a case decided by the General Term in this department."

Inslee as Administratrix, etc., v. Rochester and Syracuse Railroad Company, 214 App. Div. (N. Y.), page 680, is an example of fraud in prosecuting an action:

"A new trial will be granted in an action to recover damages for the wrongful death of plaintiff's intestate, her son, where it appears that the complaint alleged that the intestate left him surviving his mother, and did not allege that the father of the intestate, who had been divorced from the intestate's mother was living also, and did not on the trial bring that fact to the attention of the jury and in fact, fraudulently concealed the existence of the father and permitted associate counsel to refer to

the mother as a widow, and such fact was not discovered by the defendant until after the close of the trial and the entry of judgment."

Complainant alleged that the son was wrongfully killed and that the mother only survived him. No reference was made to the father. In the trial, plaintiff was constantly referred to as the "widow." The Appellate Division ordered a new trial, because the attorney of the plaintiff knew that the father was living and did not so state and further permitted the associate counsel to refer to the plaintiff as "widow." The court said on page 62:

"What effect such a statement several times repeated might have on the sympathies of the jury we do not know but the statement was made and was not supported by any evidence. In making this statement to the jury to the effect that plaintiff was a widow, counsel had no intent to deceive, for he was probably without knowledge as to the actual status of the plaintiff, but his reference to her as a widow was not based on any evidence in the case and was, therefore, improper.

"Good faith required that the fact that decedent left a father surviving him should have been disclosed either in the complaint or on the trial, but it is quite clear that there was an intent to conceal that fact and let the case go to the jury on the theory that the plaintiff was a widow and the sole next kin of decedent.

"Whether or not the father contributed to plaintiff's support is not important. **The fact that he was living** and, therefore, the plaintiff was not the sole next of kin of decedent **was surreptitiously withheld.** A judgment thus obtained should not stand. The court cannot approve a practice which in effect amounted to a legal fraud and a judgment thus tainted must be set aside. (Stevens v. C. N. Bank.

144 N. Y., 50; Wolff v. United Drug Company, Inc., 181 App. Div., 628.)"

In this very case in the New York courts, the New York courts held that suppression by Edward H. Titus the fact of his agreement with London I. Willick concerning a partial assignment of the claim, constituted a fraud upon the court. A fortiori the suppression by the plaintiff of the fact of an absolute and entire assignment, certainly constitutes fraud upon the New York courts as well as upon the defendant. (R-90)

In the case at bar, the judgment assumed the existence of a real plaintiff in interest. That issue was not raised or tried in the New York case because of the ignorance of the defendant and the surreptitious concealment of the facts by the plaintiff. Hence the doctrine of res judicata relied on by petitioner has absolutely no application. Now it appears that there was no real plaintiff in interest.

Counsel cite several New York cases to sustain their statement that a judgment will not be set aside or enforcement enjoined by reason of intrinsic fraud. We have no quarrel with that proposition. In Jacobwitz v. Herson, the unsuccessful party in an arbitration proceeding sought to set aside the award on the ground of perjury, that the successful party and his witness testified falsely on the issues. The court said that although perjured testimony alone is not sufficient to set aside a judgment, however, a judgment would be set aside where it has been procured through fraud or other undue means, which would include the fraudulent or improper conduct

of a party. In the case at bar, the plaintiff was guilty of fraudulent and improper conduct in the procurement.

Counsel rely upon the case of **Petroleum Associates v. Landers**, 182 Okla., 297. This was an action brought by a guardian of an incompetent to quiet title. The defendant urged that plaintiff had not been legally appointed, that the order of appointment did not show that the ward was present in court at the appointment. The statute provided that the person for whom the guardian was asked must be produced in court if able. The order of appointment was silent on this feature. The court said that the order raised a presumption that the ward was present or was unable to attend, and that the presumption was not subject to attack in the action to quiet title. Here a domestic judgment was involved.

Counsel rely upon **Johnson v. Petty**, 118 Okla., 17. This was a proceeding in equity in the District Court of Okmulgee county to set aside a guardianship appointment in another county on the ground that the application for appointment had set out untrue facts as to the residence and custody of the ward. The bill was allowed and the court (even though this involved a domestic judgment) held that relief would be given "where such fraud is extraneous to the issues in the proceeding attacked."

In the case of **Phillips v. Griffin**, 236 N. Y. App. Div. 209, relied upon by petitioner it was held to be error to dismiss the action on the judgment rendered by a Massachusetts court on the defendant's oral testimony that the judge in the Massachusetts court ruled that he

the defendant, was improperly served with summons. The statement of the New York court in regard to fraud is dicta, and furthermore, the New York court states at page 211:

> "If it was intended by the defendant to raise an issue of fraud, recourse must be had to a suit in equity."

We have already pointed out the distinction that in Ohio the subject matter of an equity bill may be pleaded as a defense to an action at law.

In matter of Holden cited by counsel, the assignments in question were as the New York court stated perfectly valid until legally set aside. The assignors by their act had vested legal title in the assignee. The fraud complained of was between the parties to the assignment and related to what the court characterized as a remote transaction. The fraud in the case at bar consists of plaintiff representing to the New York court and to the defendant that he was the real party in interest and of surreptitiously withholding and concealing the fact that he was not the real party in interest, when all the time he had not even a color of interest.

In the hypothetical case assumed in Harrington v. Denny, J. Otis sets forth the same kind of facts as in United States v. Throckmorton discussed infra and naturally reaches the same conclusion.

In Wright v. Saltmarsh, the court said "The contention that the decree of distribution was obtained by fraud in not disclosing the fact of the probate proceedings in the state of Kansas cannot be urged for the reason that

to disclose such proceedings would have no effect whatever upon rights of these parties in Oklahoma, and therefore the defendant owed no duty to the court to disclose to it what some other court in some other state had done with the property in that state." The court said further that the action was nothing more than an effort to avoid the decree of distribution on the ground of alleged false proof presented in the matter. In the case at bar the plaintiff not only testified falsely but in addition he suppressed and concealed and remained silent on the fact of which defendant was ignorant, that he the plaintiff had no interest whatever in the alleged claims against the defendant and hence had no standing whatsoever in court. The result was that the court had no real plaintiff before it.

On page 2582 of Freeman's Work, he discusses the rule of **some jurisdictions where perjury alone may constitute such fraud** as will invoke equitable relief against the judgment especially where there is willful perjury of or at the instigation of the successful party. **However, in the case at bar, there is something more serious than mere perjury.**

And in Freeman's Work at page 2895:

> "Hence relief can not ordinarily be had in another state on the ground of perjury and conspiracy in prosecuting the action in which the judgment was given, nor because of any fraud which might have been urged against the maintenance of the former action. The fraud which may be shown is fraud in the procurement of the judgment or decree rather than fraud in the cause of action. As to what constitutes such fraud the rule is doubtless the same as

is applied where equitable relief on this ground is sought against it in an independant action."

The fraud in Ward v. Town of Southfield, cited by counsel was intrinsic fraud going to the subject-matter of the litigation like the other cases cited by counsel.

It is noted that counsel omit from their reference to the **Southfield case** the following, appearing at the bottome of page 292 of the report (102 N. Y.):

> "But where there is fraud, not in the subject of the litigation, not in anything which was involved in the issues tried, but fraud practiced upon a party or upon the court during the trial, or in prosecuting the action, or obtaining the judgment, **then in a proper case the judgment may be attacked collaterally**, and on account thereof, set aside and vacated."

Neither do counsel in their reference to the **Southfield case** include the following appearing on page 293:

> "Neither party can mislead the other by any positive or actual fraud. **Nor can he**, for the purpose of perpetrating a fraud upon the other party, **conceal such facts as good faith and common honesty require him to reveal.**"

Note: The **Southfield case** is relied on in Corley v. Railroad Company, supra.

Counsels' cases deal with intrinsic fraud. With those cases we have no quarrel. However, they do not apply to the case at bar. **There seems to be an unanimity of opinion on the proposition that for extrinsic fraud a judgment of a sister state may be assailed at any time, anywhere** (excepting certain exceptions in forum where procured).

In **Armstrong v. Armstrong**, 117 O. S., 558, cited by appellant, the question was whether an order for alimony to be paid in future installments, entered by a Kentucky court, is within the protection of the full faith and credit clause. It was contended that the alimony order was not a final judgment. And as Judge Matthias stated "there has been much confusion, and contrariety of opinion" on that question. There is no confusion or contrariety of opinion concerning the question in the case at bar. The question is long and well settled and is not debatable.

After quoting the full faith and credit clause Chief Justice Fuller of this court speaks as follows: "This does not prevent an inquiry into the jurisdiction of the court in which a judgment is rendered, to pronounce the judgment, nor in the right of the state to exercise authority over the parties or the subject matter, **nor whether the judgment is founded in, and impeachable for, a manifest fraud**. The Constitution did not mean to confer any new power on the states, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of the state domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them as evidence."

Cole v. Cunningham (1889), 133 U. S., 107 at 112.

In **U. S. v. Throckmorton** relied on by petitioner, the full faith and credit clause was not in any remote degree involved. The fraud was in the very issues of the case, i. e., and antidated grant supported by depositions of per-

jured witnesses. The United States filed a bill in U. S. District Court of California to set aside adjudications of a board of commissioners of land claims and of that court affirming the commissioners. No such question as at bar was before the court. And this court has veered away from its dicta of the Throckmorton case for in **Hilton v. Guyot**, 159 U. S., 113 at 207, in commenting on the Throckmorton case, the court says with respect to fraud:

> "But it is now established in England, by well considered and strongly reasoned decisions of the Court of Appeals, that foreign judgments may be impeached, if procured by false and fraudulent representations and testimony of the plaintiff, even if the same question of fraud was presented to and decided by the foreign court."

After reciting the full faith and credit clause Van Devanter, J., states: "The effect of these provisions is that in the courts of other states the judgment of a court of one state is not impeachable except for fraud or want of jurisdiction * * *."

Lamb v. Stock Co., 132 Federal Rep., 431 at 441.

We quote the following from various jurisdictions:

> "Under Const. U. S., Art. 4, Sec. 1, judgments of a sister state are entitled to no greater credit than will be given thereto by the courts of the state where rendered, and may, in an action thereon, be impeached for want of jurisdiction or fraud in their procurement."

Cohen et al. v. Bromberg, Syl. 1 (Iowa 1919), 170 N. W., 478.

"Though, under Const. U. S., Art. 4, Sec. 1, judgment of Ohio court is entitled to same effect in tribunals of Kentucky that it is entitled to in Ohio, it can be attacked in Kentucky on any grounds that would invalidate it in Ohio."

Syl. 2, **Capper v. Short** (Ky. 1928), 11 S. W. (2d), 717.

"In other words, if the judgment is not conclusive, but open to a direct attack for fraud where rendered, it is also open to collateral attack on the same ground, when brought forward as a defense or a cause of action in the courts of a sister state."

Schendel v. Ry. Co., 210 N. W., 70 at 73 (Minn. 1926).

"Judgments, whether foreign or domestic may be attacked for want of jurisdiction in court trying same or for want of service or fraud in procurement"

Syl. 3, **Mendlovitz v. Shoe Co.**, 5 S. W. (2d), 559 (Texas 1928).

"Under full faith and credit clause of Const. U. S., Art. 4, Sec. 2 and Act of Congress (U. S. Comp. St. Sec. 1519) a judgment of one state sued on in another state may be impeached for fraud perpetrated in its procurement, if it might be so impeached in the state in which rendered, as in the case in Oklahoma"

Syl. 4, **Hare v. Reily** (Texas 1925), 269 S. W., 473.

"Judgment entered by court in sister state, and sued on in this state, may be set aside for fraud in obtaining it, notwithstanding Const. U. S., Art. 4.

Sec. 1, requiring full faith and credit to be given to judgment of sister state."

Syl. 3, **Dyer v. Johnson** (Texas 1929), 19 S. W. (2d), 421.

"The only defenses that can be made to a judgment obtained in another state, when sued on here, are that the court of our sister state did not have jurisdiction of the person or of the subject matter, or that it was fraudulently procured, or had been paid."

Syl. 1, **White v. Minder** (N. J. 1930), 148 Atl., 781.

"The full faith and credit provision of Const. U. S., Art. 4, Sec. 1, does not prevent an inquiry, when suit is brought in one state on a judgment rendered in another, whether the judgment is impeachable for fraud."

Syl. 1, **Ring v. Whiteman** (N. C. 1927), 140 S. E., 159.

"Judgments of other states are conclusive of all questions involved in them except fraud in their procurement, and whether the parties were properly brought before the court in view of Const. U. S., Art. 4, Sec. 1, and acts of Congress enacted in pursuance thereof."

Syl. 4, **Webb v. Friedberg** (N. C. 1925), 126 S. E., 508.

"Under constitutional requirement that each state give full faith and credit to public acts and records of other states, **full faith can only be given to that which is a result of good and full faith, and credit can only be given when and where act, record or proceeding is not tainted with dishonesty and fraud**

practiced upon the state issuing or participati
same."

Morris v. Morris (1936), 289 N. Y. S., 636, 8

"Judgment rendered by competent tribunal
ing jurisdiction is conclusive on merits in cou
another state unless fraud is established."

Syl. 2, **Franklin v. Lee**, 253 N. Y. S., 620 (1

"'Full faith and credit' clause and rule of co
of states were not intended to aid in perpetrati
fraud or wrong (Article IV, Section 1, U. S.
stitution)."

Syl. 6, **Larrick v. Walters**, 20 O. A., 363.

In **Christmas v. Russell**, 72 U. S., 290, relied o
petitioner, the action was on a note, the defendant b
a resident of Mississippi. By the Mississippi statute
action was barred after six years. Suit was had in K
tucky while defendant was visiting there. The Mi
sippi statute was set up in defense, but judgment
entered. A transcript was taken to Mississippi and s
on in the United States Court there. A further Mi
sippi statute provided that no action could be m
tained on a judgment rendered by a court without
state against a resident of Mississippi in a case wh
the action would have been barred in Mississippi.

This court held the above latter statute to be voi

It was also claimed that the judgment had been
tained in fraud of this statute. This court, page
seemed to think that the question of fraud would h
to be raised on the chancery side. And in this con

tion referred to **Anderson v. Anderson**, 8 Ohio, 108. In Ohio now as a matter of practice as we have treated at length supra (which was not the practice at the time Anderson v. Anderson was decided) a defendant is permitted in actions at law to set up legal or equitable defenses or both.

Since Christmas v. Russell was decided this court has in Cole v. Cunningham supra recognized the right of a state to inquire into the question of whether or not the judgment of a sister state was founded in fraud.

And as late as 1935 in **Milwaukee County v. White Co.**, 296 U. S., 268, at 276, this court has recognized that recovery on the judgment of a sister state can be resisted on the ground that it was procured through fraud.

Counsel (page 25 of petitioners brief) make some point claiming that the defendant had knowledge in 1929 of the fraud being perpetrated by the petitioner. To this claim made below, the Court of Appeals had this to say:

> "It is further claimed by the plaintiff that the facts upon which the trial court predicated the finding of fraud against the plaintiff were known or should have been known to the defendant during the progress of the litigation in New York and that it is too late to assert them now. A consideration of the record on this question does not support the claim of the plaintiff."

CONCLUSIONS.

I.

There is an independent ground of state procedure as a basis for the decisions below.

II.

The question of fraud in procuring the New York judgment is a question of fact which was found and determined by the lower courts.

III.

Under the Ohio practice the action on the New York judgment was properly defended on the ground of fraud in the procurement.

Respectfully submitted,

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APPENDIX A.

Motion for New Trial in Trial Court.

Plaintiff moves the court for an order setting aside the decision heretofore rendered in this case and granting a new trial, for the following reasons, to wit:

1. The decision of the court is against the weight of the evidence and contrary thereto.

2. The decision of the court is contrary to law.

3. The court erred in the admission of evidence over the objection and exception of plaintiff.

4. The court erred in excluding evidence offered by plaintiff to which objection was made and exception was taken.

5. The court erred in overruling plaintiff's motion for judgment at the close of defendant's case.

6. The court erred in overruling plaintiff's motion for judgment at the close of all of the evidence.

7. Other errors of law occurring at the trial of said cause prejudicial to the rights of plaintiff and by which plaintiff was prevented from having a fair trial.

8. The decision is not sustained by sufficient evidence and is contrary thereto.

Plaintiff moves the court for a judgment in his favor notwithstanding the decision of the court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 188.

EDWARD H. TITUS, *Petitioner*,

v.

LOU C. WALLICK, *Respondent*.

On Writ of Certiorari to the Supreme Court of Ohio.

SUPPLEMENTAL BRIEF OF RESPONDENT RE INDEPENDENT NON-FEDERAL GROUND ADEQUATE TO SUPPORT JUDGMENT BELOW.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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THE JUDGMENT BELOW WAS BASED UPON AN INDEPENDENT NON-FEDERAL GROUND ADEQUATE TO SUPPORT IT.

This court has frequently held that where an independent and adequate non-Federal ground of decision exists review may not be had in this court even though the State court in terms purports to decide a Constitutional question and decides it erroneously. (*Fox Film Co.* v. *Muller,* 296 U. S. 207, 210, and cases cited) The view that the existence of a Constitutional question in the State court record gives this court jurisdiction over the whole case, empowering it to de-

cide every question presented in the record whether of State or Federal law, has been definitely rejected by this court. (*Murdock* v. *Memphis*, 20 Wall. 590)

An examination of the decision of the Court of Appeals below shows that it was based upon two grounds, (1) that plaintiff was not the real party in interest in the *Ohio suit* within the meaning of an Ohio Statute (General Code of Ohio Sections 11241, 11244) providing that an action must be prosecuted in the name of the real party in interest, and (2) that plaintiff practiced fraud in procuring the New York judgment. It is obvious that if the judgment below is based in part upon the first ground above stated, it constitutes an independent non-Federal ground adequate to support it.

That there is this non-Federal basis to the decision below seems unquestionable from an examination of the record. There was no written opinion in the Court below, the Supreme Court of Ohio. The Court simply dismissed the appeal "for the reason that no debatable constitutional question" was involved in the case (R. 195). However, the intermediate Ohio court, the Court of Appeals, rendered a written opinion from which it is clear that there was the question *in the Ohio courts*, as to whether the plaintiff in bringing the present suit was the real party in interest within the meaning of the *Ohio law*. Thus the Court of Appeals, in its opinion states:

> "The trial court's opinion is before us. The conclusion is there reached that the plaintiff, in the suit in New York and *in the action here*, was not the real party in interest and that the judgment in New York was secured by fraud practiced by the plaintiff upon the court and the defendant, in suppressing the fact that he was not the real party in interest." (R. 180; italics ours)

The court further said:

> "With the finding that the plaintiff was not the real party in interest in the actions *in Ohio* and in New

York we are in accord upon a fair consideration of the status of the plaintiff, his brother and defendant." (R. 180; italics ours)

The court after referring to the "Article of Agreement" (R. 181-183) and analyzing it states:

"Upon this whole instrument, then, over and beyond the power of attorney granted to Edward he had no interest whatever except the contingency provided for in (f). The action instituted in New York and *in Ohio* did not proceed as one wherein Edward was plaintiff as attorney for Walter as provided in Condition 2 of the agreement, but in his own name and right. The power of attorney will not support the action in the form in which it has been prosecuted, nor was the contingent interest of Edward such as that it would authorize him in his own name to be a proper party plaintiff.

"Sections 11241 and 11244, G. C. (General Code of Ohio) are, insofar as they relate to the instant action, substantially the same as Section 210 of the Civil Practice Act of the State of New York, (fol. 266) which provides that:

'An action must be prosecuted in the name of the real party in interest except that . . . a trustee of an express trust, . . . may sue without joining with him the person for whose benefit the action is prosecuted.'

"And in Ohio the exception has been considered in Brown v. Ginn, 66 O. S., 316, which holds that:

'In order to constitute one a trustee of an express trust within the meaning of the statute, the right and duty to bring the action must be incidental to the other powers and duties under the assumed trust, and the authority must not be confined simply to the bringing of an action to collect the subject of the contract which purports to create the trust, and to pay the next proceeds over to the assignor.'

"See also Hadden v. Rowe, 3 O. Opinions, 68 (130 O. S., 10)." (R. 183; italics ours)

Further, the court said, referring to the affidavit:

> "But the plaintiff, though cognizant of the purpose for which the affidavit was introduced . . . did not attempt to explain the subject matter of the affidavit which was under consideration. On the contrary, the plaintiff stands upon the record and urges that his position as set forth in the affidavit is not inconsistent with his right to maintain the action in New York and *the action here.*" (R. 186; italics ours)

Concluding on this point, the court said:

> "The trial court committed no prejudicial error in holding that the plaintiff was *neither in Ohio* nor in New York a real party in interest in the *respective actions here and there.*" (R. 186; italics ours)

Not only does the opinion of the Court of Appeals indicate that that court held that under *Ohio law* plaintiff was not the real party in interest in the Ohio suit but the Conclusions of Law in the trial court show that this was one of the grounds of decision in that court. The trial court entered the following "Conclusion of Law":

> "3. The court finds as a conclusion of law that the plaintiff herein is not the real party in interest in *this* action and has no right to maintain *this* action in his name." (R. 173; italics ours)

The opinion of the trial court states:

> "The amended answer sets up the defenses:
>
> . . . . . .
>
> 2. The plaintiff *in the action at bar*, here in *Franklin County*, Ohio, is not the real party in interest." (R. 148; italics ours)

The Assignments of Error in the Court of Appeals are to the same effect. The Sixth Assignment of Error is as follows:

> "6. The court erred in its conclusions of law No. 3, that 'the plaintiff herein is not the real party in inter-

est in *this* action and has no right to maintain this action in his name." (R. 177; italics ours)

It seems clear from the above that the Ohio courts consistently held, *as a matter of fact*, that plaintiff was not the real party in interest within the meaning of Sections 11241 and 11244 of the General Code of Ohio.

An analysis of the opinion of the Court of Appeals shows that for eight pages it is devoted to a consideration of whether the plaintiff was the real party in interest within the meaning of the Ohio Code (R. 178-186). The court concluded that examination by stating:

> "The trial court committed no prejudicial error in holding that the plaintiff was neither in Ohio nor in New York a real party in interest in the *respective actions here and there.*" (R. 186; italics ours)

An examination of that part of the opinion dealing with the present question shows that the Court of Appeals below held that the plaintiff was not the real party in interest, *as a matter of fact*, based upon the trial court's reliance upon the affidavit of August 17, 1934, as stating that prior to November 23, 1925, plaintiff had assigned his interest to Walter L. Titus (R. 180). In arriving at this conclusion the trial court, affirmed by the Court of Appeals, considered the claim that the plaintiff became the real party in interest by reason of a so-called "Article of Agreement" of December 1, 1925, and refused to allow the claim, holding under the Ohio decisions that the "Agreement" was a mere power of attorney to sue. (Trial Court's opinion R. 150; Appellate Court's opinion R. 185, 186).

In ruling on its effect, the trial court said that if claim be made that plaintiff's suit

> "in New York and *in this court* is based on his having a suable interest by virtue of the instrument of December 1, 1925." (R. 156; italics ours)

(which both the trial court and the Court of Appeals repudiated), then what of the affidavit? (Trial Court R. 156; see also Court of Appeals Decision, R. 185, 186) This decision of the trial court and of the Court of Appeals is based upon a *finding of fact* at least insofar as both courts follow the affidavit of August 17, 1934, and repudiate the agreement of December 1, 1925. This amounts to a finding of fact by a lower state court concurred in by the Appellate Court. The rule of this court in such cases is that such findings of fact concurred in by both trial and Appellate courts will not be disturbed.

293 — *Radio Corporation* v. *Radio Engineering Laboratories*, ~~296~~ U. S. 1, 6;
U. S. v. *State Investment Co.*, 264 U. S. 206, 211;
Texas and No. R. Co. v. *Brotherhood*, 281 U. S. 548, 558;
U. S. v. *Commercial Credit Co.*, 286 U. S. 63, 67.

Respondent's *pleadings* further show that one of the grounds of defense was that plaintiff was not the real party in interest in the Ohio statute under *Ohio law.* Thus respondent's answer to the first pleading filed states:

> "Further answering the defendant says that he is informed and therefore believes and alleges that the plaintiff is not the real party in interest *in this action.*" (R. 24; italics ours)

The plaintiff moved to strike the defendant's answer and in defendant's answer brief to this motion to strike, defendant stated:

> "Let us now direct the court's attention to the fourth paragraph of this answer, to the allegation that the plaintiff is not the real party in interest. If the plaintiff is not the real party in interest, of course he cannot prosecute the action at bar." (R. 28; italics ours)

In another answer brief the defendant raised the same uestion of the Ohio State law:

> "Counsel cite some New York statutory law on the question of real party in interest. Whether or not that is the New York law we do not know. In the first place it would need to be proven and in the second place the *Ohio real party in interest statute* is procedural and we submit that it is an elementary proposition of the law of conflicts that as to procedure the law of the forum applies." (R. 37; italics ours)

he amended answer likewise states:

> "Further answering the defendant says that the plaintiff is not the real party in interest in *this* action." (R. 40; italics ours)

Both the Ohio and the New York statutes simply pro- ide that the suit must be brought by "the real party in nterest" (Sections 11241, 11244 General Code of Ohio; Civil Practice Act of New York, Section 210), leaving it to he Courts, here the courts of Ohio, to decide what, under Ohio law, the real party in interest means in the Ohio stat- ute and whether *in fact* plaintiff was the real party in in- terest in the Ohio court.

The above difficulty seems to have been not unsuspected by counsel for petitioner, as in their Brief on Writ of Certiorari petitioner attempts to show that in arriv- ing at the conclusion that the plaintiff was not the real party in interest under *Ohio* law, the Ohio courts had first to determine that he was not the real party in interest under New York law. Petitioner states in his Brief on Writ of Certiorari:

> "To find that petitioner was not the real party in interest under the Ohio law, the Ohio courts determined first that petitioner was not the real party in interest in the New York suit and that he perpetrated a

> fraud upon the New York courts. In making such determination, the Ohio courts went, automatically, behind the New York judgment conclusive, as to all matters which were actually determined and all matters which might have been litigated—including the defense of lack of capacity to sue." (Brief for Petitioner on Writ of Certiorari, p. 34)

Even assuming this to be so, namely, that the Ohio court reached the juridical determination that plaintiff was not the real party in interest in the Ohio suit by a mode of reasoning which involved differing with the New York decisions on real party in interest, still this does not make the Ohio court's decision any the less a decision of fact and the application of its own law, having nothing to do with any question of Full Faith and Credit.

The question is not being argued *in vacuo*: the point must be discussed bearing in mind the limitations upon the jurisdiction of this court with reference to review of state court decisions. There is nothing to show that before the Ohio court could determine that plaintiff was not the real party in interest under the Ohio law and so had no right to maintain the Ohio suit, it would have to hold that plaintiff was not the real party in interest in New York. The determination of plaintiff's right to bring the Ohio suit in the Ohio court could have been entirely independent of the New York adjudication, and indeed, in theory of law must be considered to have been independently arrived at, inasmuch as the Ohio court must first have determined whether plaintiff was the real party in interest *in Ohio* before considering any question whatever relative to the validity of the judgment in New York. This question would not necessarily be determined by an examination of the New York judgment, which would only enter the case as an item of proof, *after* the Ohio court had determined that plaintiff had the necessary standing to sue.

Petitioner's claim in his brief on Writ of Certiorari (p. 34) that the findings of the Ohio courts that petitioner was not the real party in interest and perpetrated a fraud upon the New York courts, are completely interwoven with the denial of Full Faith and Credit, under *Fiske v. Kansas* 274 U. S. 383, 385; *Kansas City Southern R. Co. v. Albers Commission Co.*, 223 U. S. 573, 591, do not permit this court to overturn the decision of the Ohio State Courts on a question of Ohio State law. In these cases the violation of the Federal right depended upon the existence in the record of certain facts. This court simply held that it could examine the record to see if the facts were there, or how they were there. But no such claims can be made here. If the Ohio courts determine that under the laws of Ohio the plaintiff was not the real party in interest in the present suit there would be no deprivation of a Federal right. How the Ohio courts arrived at that conclusion is beside the point. The plaintiff has no right under the Federal Constitution or laws to be regarded as a real party in interest when he files a suit in an Ohio state court. Even assuming the Ohio state court decided wrongly, this error could be corrected only on appeal in the Ohio state courts, which courts evidently felt there was nothing in the point. Even assuming that the Ohio state statute was similar to the New York state statute, that construing the Ohio state statute against plaintiff prevented the Ohio court, on the ground of judicial consistency, from holding that he was the real party in interest in New York, our answer is still the same: the New York judgment has not been impeached in the Constitutional sense, the Ohio court has simply held that *in the Ohio court* the plaintiff is not the real party in interest within the meaning of an Ohio statute. The fact that the New York statute is similar in words to the Ohio statute is a mere coincidence with respect to a determination of whether the plaintiff comes within the Ohio statute. There is no legal connection between the two questions and

it is respectfully submitted that this court, by reason of downright jurisdictional restrictions, is not permitted to inquire into the validity of the Ohio court's decision applying the Ohio state law.

After all, the Ohio state court has simply held the plaintiff has not followed the proper procedure in the Ohio State courts. The decision below has destroyed no substantive rights, it has simply held that the plaintiff did not follow the proper procedure in bringing his suit because of violation of a specific Ohio statute. A decision by the Ohio courts as to the right of plaintiff to sue in Ohio was a pre-requisite to the suit on the New York judgment. Even assuming that the judgment was perfectly valid and unimpeachable in New York, there is nothing in the Full Faith and Credit clause requiring the Ohio courts to permit a suit except in accordance with the Ohio State Code governing such suits. A preparatory step toward permitting any suit at all to be maintained on the New York judgment in the Ohio courts was the necessary finding by the Ohio courts that the plaintiff complied with the provisions of the Ohio State Code relative to being the real party in interest. If he was not the real party in interest within the meaning of the Ohio statute (not the New York statute) there was no opportunity for the Ohio court to exercise its jurisdiction and grant the relief prayed for and hence no opportunity to violate the Full Faith and Credit clause.

It is no argument against the decision below that the Ohio statute is somewhat similar to the New York statute, plus the argument that if the Ohio court was wrong in construing the New York statute it was likewise wrong in construing the Ohio statute. The point is, that however wrong hypothetically the Ohio court might be with respect to the New York statute, there is no power in this court to reverse the decision of the highest court of Ohio with referenec to the Ohio statute.

In this respect the present case is somewhat similar to *De Saussure* v. *Gaillard*, 127 U. S. 216, 233, wherein the

highest court of South Carolina held that the plaintiff in the case was not a proper party to bring suit. In spite of this the court went on to decide a Federal question. When the case came to this court, this Court, after pointing out that the state court had held that the plaintiff did not come within the class of persons entitled to bring the suit, after which the state court decided the Federal question, remarked:

> "It thus appears that in point of fact the Supreme Court of the State of South Carolina in its opinion in this case passed upon the Federal question sought to be raised by the plaintiff as the foundation of his case, and decided it adversely to him; but the analysis of the case which we have made shows clearly that the decision of that question was not necessary to the judgment. Before reaching that question, the Supreme Court had already decided that the action of the plaintiff could not be sustained, according to the meaning of the provisions of the statute under which it was brought. The decision of that point was final, and was fatal to the plaintiff's right of recovery. That question is not a federal question; it does not arise under the Constitution of the United States, or of any law or treaty made in pursuance thereof. It is not a question, therefore, which, under, this writ of error, we have a right to review. We are not authorized to inquire into the Grounds and reasons upon which the Supreme Court proceeded in its construction of that statute. It is a state statute conferring certain rights upon suitors choosing to avail themselves of its provisions upon certain conditions in certain cases. Who may sue under it, and when, and under what circumstances, are questions for the exclusive determination of the state tribunals whose judgment thereon is not subject to review by this court." (De Saussure v. Gaillard, 127 U. S. 216, 232, 233)

In the same way this court has held generally that state court rulings declining jurisdiction on the ground that the

plaintiff has mistaken the court or his remedy affords an adequate non-Federal ground for decision. See:

People of New York ex rel. Doyle v. *Atwell*, 261 U. S. 590.
Farson v. *Bird*, 248 U. S. 268, 271.
Yesler v. *Commissioners*, 146 U. S. 646, 657.
Ohio ex rel. Eastman v. *Stuart*, 291 U. S. 643.
Allison v. *Texas*, 295 U. S. 717.

In the same way this court has held in *Rogers* v. *Jones*, 214 U. S. 196, that where a state court had held that the plaintiff had not stated a cause of action within the meaning of the state statute, there was an adequate non-Federal ground of decision.

This court has held in *John* v. *Paullin*, 231 U. S. 583, that no Federal right is denied by a state court in dismissing an appeal on the ground that its jurisdiction was not invoked in accordance with the laws of the state, the state having the right to prescribe the jurisdiction of its appellate courts and the mode of invoking it. The same is true in the present case with respect to the Ohio statute limiting the jurisdiction of its courts to the real parties in interest.

In *Newman* v. *Gates*, 204 U. S. 89, this court was asked to review a decision of a state court involving the Full Faith and Credit clause. The case had been taken to the highest court of the state which dismissed the appeal for failure to substitute the personal representatives of a deceased appellant. In holding that this court had no jurisdiction, this court said:

> "Had the appeal been properly taken it would have been the duty of the Supreme Court of Indiana to pass upon the question presented by the record before it, including, it may be, a Federal question, based upon the Full Faith and Credit Clause of the Constitution, which, on various occasions, was pressed upon the attention of the trial court. In legal effect, however, the case stands as though no appeal had been prosecuted from the judgment rendered by the trial court." (p. 95)

It is submitted that there is no distinction in principle between the inability of this court to consider an alleged Federal question not ruled on by the higher state court because the case was not properly before it and the present situation wherein the case was never properly in the state courts at all.

As to a possible claim of *res judicata* as to the real party in interest the most that can be said by petitioner is that the New York courts *impliedly* held that plaintiff was the real party in interest in New York, inasmuch as they gave him a judgment. But the suit in Ohio was an entirely separate suit and no New York court could deprive the Ohio courts of their sovereign right to construe and apply their own statute and determine for themselves who was the real party in interest *in Ohio*. The judgment in New York would not foreclose this inquiry, for who was the real party in interest in the Ohio suit could never be raised in the New York case.

Even if the New York court had specifically decided the point, and held the plaintiff was the real party in interest under a New York statute word for word similar to the Ohio statute, the Ohio court was still free to differ with the New York court and hold the plaintiff was not the real party in interest in Ohio. Full Faith and Credit is not involved because in Ohio the issue was the right of plaintiff to maintain the Ohio suit which is antecedent to plaintiff's right to submit in evidence in this suit the New York judgment. *Res judicata* is inapplicable because whether the plaintiff was the real party in interest in Ohio could never have been passed on in New York.

In addition, a denial of the doctrine of *res judicata* does not raise a Federal question nor was certiorari applied for review such a question and so the point is not open to this court for decision. (*Alice State Bank* v. *Houston Pasture Co.*, 247 U. S. 240.) This court has decided that in cases between the same parties where the second action is upon a different claim or demand, the judgment in the prior action

operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. (*Cromwell* v. *County of Sac*, 94 U. S. 35, 353) In that case this court said:

> "In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." (p. 353)

In the present case the Ohio suit on the New York judgment was a separate and distinct cause of action. (*Brown* v. *Fletcher*, 182 Fed. 963.) The suit was on the judgment alone with no disclosure whatever of any other cause of action. (R. 7) The defense of the lack of the real party in interest was not interposed in the New York suit and so by no conceivable argument can the doctrine of *res judicata* be interposed in the Ohio case. A defense of the lack of the real party in interest in the Ohio suit on the New York judgment, is analogous to the defense of the statute of limitations. Under this court's decision in *McElmoyle* v. *Cohen*, 13 Peters 312, 327, the defense of the statute of limitations of the forum can always be interposed against a suit on a foreign judgment. There is no substantial difference between a suit at the wrong time on a foreign judgment and a suit by the wrong party. If the state of the forum can prevent one without violating the Full Faith and Credit clause, it can prevent the other and the question of what facts make out a good defense under the state statute is always one for the state court to determine. As held in the *McElmoyle* case, *supra*, the state statute involves a plea to the remedy and consequently the *lex fori* must prevail.

As to Comity, Comity does not require the Ohio court to say that because plaintiff *might have* been the real party in interest in New York (the point was never raised) he

must therefore be the real party in interest in Ohio. It follows that the Ohio court was free to decide the point as it did and its judgment on a question of fact or of purely state law is final in this court.

CONCLUSION.

The decision of the Court of Appeals of Ohio that plaintiff was not the real party in interest under the Ohio statutes is conclusive in this court; (a) treating it as a finding of fact concurred in by the two (or three) Ohio courts, or (b) treating it as a matter of law involving the construction and application by the Ohio courts of Ohio State statutes.

Respectfully submitted,

WILLIAM M. SUMMER,
Attorney for Respondent.

JOSEPH P. TUMULTY, SR.,
JOSEPH P. TUMULTY, JR.,
WILLIAM J. HUGHES, JR.,
Of Counsel.

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Supreme Court, U. S.
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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 188

EDWARD H. TITUS,
Petitioner,

vs.

LOU C. WALLICK.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

MOTION TO PRINT ABBREVIATED RECORD.

THOMAS I. SHERIDAN,
AARON FRANK,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938.

No. 188

EDWARD H. TITUS,

Petitioner,

vs.

LOU C. WALLICK,

Respondent.

MOTION TO PRINT ABBREVIATED RECORD.

To the Supreme Court of the United States and the Honorable Justices Thereof:

Comes now Edward H. Titus, petitioner in the above entitled cause, by his attorneys, Thomas I. Sheridan and Aaron Frank, and moves this Honorable Court for an order to print an abbreviated record herein consisting of the following parts of the record filed in this cause with the Clerk of this Court on the 8th day of July, 1938:

	Record pages.
1. Transcript of docket and journal entries, Court of Common Pleas, Franklin County, Ohio	1–7
2. Transcript of docket and journal entries from the Court of Appeals, Franklin County, Ohio	210, 211, 214

	Record pages.
3. Transcript of docket and journal entries, Supreme Court of Ohio	239, 240
4. Petition of Edward H. Titus, plaintiff, filed in the Court of Common Pleas, Franklin County, Ohio, on August 20, 1934	8, 9
5. Exemplified copies of the following, annexed to said petition, together with certification with respect thereto	10-31
Summons in the action commenced in the New York Supreme Court, County of New York, by Edward H. Titus, plaintiff, vs. Lou C. Wallick, defendant.	
Second amended complaint in said action.	
Second amended answer in said action together with Exhibit A annexed thereto.	
Final judgment, with notice of entry, in said action, dated May 1, 1934, confirming Referee's report filed in the office of the Clerk of the County of New York on March 29, 1934, and granting judgment in favor of Edward H. Titus, plaintiff, against Lou C. Wallick, defendant, in said action in the Supreme Court of the State of New York, New York County, in the sum of $389,103.21.	
6. Summons issued on August 20, 1934, by the Clerk of the Court of Common Pleas, Franklin County, Ohio, in suit commenced in said court by Edward H. Titus, plaintiff, vs. Lou C. Wallick, defendant, and sheriff's return thereof	32
7. Alias summons issued on September 7, 1934, by the Clerk of the Court of Common Pleas, Franklin County, Ohio, in suit commenced in said court by Edward H. Titus, plaintiff, vs. Lou C. Wallick, defendant, and sheriff's return thereof	33

	Record pages.
8. Answer filed in the Court of Common Pleas, Franklin County, Ohio, on October 6, 1934, by Lou C. Wallick, defendant	43, 44
9. Motion and memorandum filed in the Court of Common Pleas, Franklin County, Ohio, on October 26, 1934, by Edward H. Titus, plaintiff, to strike defendant's answer from files as frivolous and interposed solely for purpose of delay	45–47
10. Defendant's memorandum answering plaintiff's motion to strike answer from the files, filed on November 14, 1934	48–51
11. Entry and order filed on November 23, 1934, overruling plaintiff's motion to strike from the files the answer interposed in the above entitled action by defendant	52
12. Defendant's amended answer filed on October 17, 1935	69, 70
13. Defendant's amendment to amended answer filed on November 8, 1935	73
14. Plaintiff's answers to interrogatories, submitted with the amended answer of the defendant filed by plaintiff on December 7, 1935	78, 79
15. Plaintiff's reply to defendant's amended answer filed on January 14, 1936	86, 87
16. Opinion and decision rendered in the above entitled action by Judge Charles A. Leach of the Court of Common Pleas, Franklin County, Ohio, on April 21, 1936	166–176
17. Plaintiff's request to separately state conclusions of fact from conclusions of law filed on April 24, 1936	182
18. Plaintiff's motion for a new trial filed on April 24, 1936	183

	Record pages.
19. Plaintiff's motion filed on April 24, 1936, requesting the trial court to rule upon the admissibility of plaintiff's Exhibit D and defendant's Exhibits Nos. 1 to 8, inclusive, and further, that the trial court rule upon the motions made by plaintiff at the close of defendant's evidence and at the close of all of the evidence	184
20. Written decision, filed on September 19, 1936, of Judge Charles A. Leach of the Court of Common Pleas, Franklin County, Ohio, setting forth findings of fact and conclusions of law	186-190
21. Entry filed June 30, 1936, overruling plaintiff's motion for a new trial	185
22. Plaintiff's motion requesting the trial court to amend its findings of fact by finding whether a reassignment of the claim was made by Walter L. Titus to plaintiff on December 1, 1925, and whether defendant had knowledge of a reassignment, said motion being filed on October 24, 1936	191
23. Entry and order filed on December 3, 1936, overruling plaintiff's motion requesting the trial court to amend its findings of fact	192
and entries subsequent thereto	180, 181
24. Entry and judgment filed on December 3, 1936, ruling on the admissibility of plaintiff's Exhibit D and the defendant's Exhibits Nos. 1 to 8, inclusive; overruling plaintiff's motions at the close of all of the evidence; overruling plaintiff's motion for a new trial and rendering judgment against plaintiff for costs and in favor of defendant	193, 194

	Record pages.
25. Plaintiff's amended notice of appeal filed on December 12, 1936, from final order and judgment rendered herein by the Court of Common Pleas, Franklin County, Ohio	198–200
26. Entry filed on February 24, 1937, correcting the entry and final order and judgment herein of December 3, 1936, and entering same *nunc pro tunc*	203–209
27. Plaintiff's assignments of error filed with the Court of Appeals of Franklin County, Ohio	218, 219
28. Entry and order of the Court of Appeals of Franklin County, Ohio, filed February 14, 1938, affirming the judgment herein of the Court of Common Pleas of Franklin County, Ohio	235
29. Opinion and decision affirming the judgment herein of the Court of Common Pleas of Franklin County, Ohio, rendered by Court of Appeals of Franklin County, Ohio, on November 30, 1937	220–234
30. Mandate from Court of Appeals of Franklin County, Ohio, filed February 14, 1938, affirming the judgment herein of the Court of Common Pleas of Franklin County, Ohio, ordering that defendant recover his costs of appellant and ordering further that a special mandate issue directing said Court of Common Pleas to carry said judgment into execution	236, 237
31. Plaintiff's notices of appeal to the Supreme Court of Ohio from judgment rendered herein by the Court of Appeals of Franklin County, Ohio, said notices of appeal being filed on March 4, 1938, in said Court of Appeals of Franklin County, Ohio, and in the Supreme Court of Ohio	238, 241

	Record pages.
32. Plaintiff's assignments of error filed in the Supreme Court of Ohio on March 8, 1938	242-244
33. Plaintiff's motion in the Supreme Court of Ohio for an order directing the Court of Appeals, Franklin County, Ohio, to certify its record to the Supreme Court	245, 246
34. Defendant's motion to dismiss plaintiff's appeal as of right, for the reason that no debatable constitutional question is involved in the case	247
35. Entry and order made by the Supreme Court of Ohio on April 27, 1938, overruling plaintiff's motion for an order directing the Court of Appeals of Franklin County, Ohio, to certify its record, set forth in Journal Entries	240
36. Judgment entry of the Supreme Court of Ohio made on April 27, 1938, ordering and adjudging that plaintiff's appeal, filed as of right herein, be dismissed, for the reason that no debatable constitutional question is involved in the cause herein, and further ordering and adjudging that defendant recover from plaintiff his costs and that a special mandate be sent to the Court of Common Pleas of Franklin County, Ohio, to carry said judgment into execution, set forth in Journal Entries	240
37. Bill of exceptions, filed on December 18, 1936, in the Court of Common Pleas of Franklin County, Ohio, setting forth the proceedings at the trial of the cause herein on January 20, 1936	89-111
38. From bill of exceptions, filed in the Court of Common Pleas of Franklin County, Ohio, setting forth notice to take depositions, dated January 21, 1936; and setting forth further the depositions of Louis W. Severy and Edward H. Titus, plaintiff	112-127

Record pages.

39. The opinion rendered by Mr. Justice Edward J. McGoldrick on April 13, 1934, confirming Referee's report and preliminary to submission of final judgment of May 1, 1934, said opinion being set forth on page 881 of defendant's Exhibit 5, consisting of the record on the appeal taken by defendant from final judgment in plaintiff's favor in the Supreme Court of the State of New York ..... 148, folios 2641 to 2643

40. Exemplified copies, and certificate of the Clerk of the County of New York pertaining thereto, of the order of the Appellate Division of the Supreme Court of the State of New York, First Department, affirming the judgment of the Supreme Court, New York County, in favor of plaintiff herein and against defendant herein, which judgment was entered on the first day of May, 1934, said order being made on May 24, 1935; and of the judgment entered on said affirmance in the office of the Clerk of the County of New York on June 5, 1935; said exemplified copies constituting plaintiff's Exhibit B 128–131

41. Statement under Rule 234 contained in defendant's Exhibit 4, on page 1 thereof, pertaining to the action in the Supreme Court of the State of New York wherein Edward H. Titus was plaintiff and Lou C. Wallick was defendant, said Exhibit 4 consisting of the record on the appeal taken by defendant from final judgment in plaintiff's favor in the Supreme Court of the State of New York ..... 147, folios 1 to 5

Record pages.

42. Defendant's Exhibit 7 at the trial herein, constituting an affidavit sworn to on August 17, 1934, by plaintiff herein, said affidavit having been interposed on September 7, 1934, in an action in the Supreme Court of the State of New York, New York County, wherein plaintiff herein was defendant and one London I. Wallick was plaintiff; together with certification of the Clerk of the County of New York with respect thereto 151-16

43. Instrument of assignment executed by Edward H. Titus, plaintiff, on March 31, 1924, constituting defendant's Exhibit 8 at the trial herein 165

44. Agreement dated December 1, 1925, between Walter L. Titus and plaintiff herein, constituting plaintiff's Exhibit E at the trial herein, said Exhibit E being the original of said agreement and plaintiff's Exhibit D at the trial herein, being an executed copy thereof 137-142
and envelope, constituting plaintiff's Exhibit F 143

45. Excerpt from testimony given by plaintiff herein upon cross-examination during the first trial held in the Supreme Court of the State of New York, said excerpt being contained in defendant's Exhibit 1 herein, and consisting of the last question at folio 399, the answer thereto appearing at folio 400 and the first question and answer appearing at folio 400, inserting after the word "he" in the last answer, the name London I. Wallick in parentheses, said folios, further, being contained in pages 133 and 134 of the Case on Appeal contained in said defendant's Exhibit 1, said Case on Appeal consisting of the record of the proceedings had on the first trial

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held in the Supreme Court of the State of New York wherein Edward H. Titus was plaintiff and Lou C. Wallick was defendant ..... 144, folios 399 and 400 of second Case on Appeal in said Exhibit

46. Judgment rendered in the Supreme Court of the State of New York on December 29, 1926, and entered on January 3, 1927, in favor of defendant and against plaintiff, said judgment being set forth on pages 41 to 43, inclusive, of the Case on Appeal set forth in defendant's Exhibit 1, said Case on Appeal consisting of the record of the proceedings had on the first trial held in the Supreme Court of the State of New York wherein Edward H. Titus was plaintiff and Lou C. Wallick was defendant ..... 144, folios 121–127 of second Case on Appeal in said Exhibit

47. Opinion rendered by Mr. Justice Proskauer prior to the making of said judgment of December 29, 1926, said opinion being set forth on pages 371 to 379, inclusive, of the Case on Appeal set forth in defendant's Exhibit 1, said Case on Appeal consisting of the record of the proceedings had on the first trial held in the Supreme Court of the State of New York wherein Edward H. Titus was plaintiff and Lou C. Wallick was defendant ..... 144, folios 1111–1136 of second Case on Appeal in said Exhibit

Record pages

48. Interlocutory judgment entered on April 2, 1928, upon reversal by the Appellate Division of the Supreme Court of the State of New York, First Department, of the judgment dismissing plaintiff's complaint entered in the office of the Clerk of the County of New York on January 3, 1927, set forth on pages 53 to 56, inclusive, of defendant's Exhibit 1, consisting of the record on the appeal taken by plaintiff from an order granting a second trial in the Supreme Court of the State of New York 14

folios 158-16

49. Defendant's notice of motion dated February 14, 1929, for an order setting aside the judgment entered for the plaintiff and against defendant in the office of the Clerk of the County of New York on April 2, 1928, and moving, further, for a new trial, said notice of motion being set forth on pages 7 and 8 of the defendant's Exhibit 1, consisting of the record on the appeal taken by plaintiff from an order granting a second trial in the Supreme Court of the State of New York ..... 144.

folios 19-24

50. Memorandum of agreement of November 23, 1925, between London I. Wallick and plaintiff, set forth on page 35 of defendant's Exhibit 1, consisting of the record on the appeal taken by plaintiff from an order granting a second trial in the Supreme Court of the State of New York ..... 144.

folios 104, 105

51. Affidavit of Frank F. Gentsch dated March 9, 1929, submitted by defendant in support of said motion for a new trial, said

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affidavit being set forth on pages 115 to 122, inclusive, of defendant's Exhibit 1, consisting of the record on the appeal taken by plaintiff from an order granting a second trial in the Supreme Court of the State of New York ..... 144, folios 343–366

52. Order made on May 31, 1929, by Mr. Justice Louis A. Valente granting defendant's motion for a new trial, said order being set forth on pages 2 to 6, inclusive, of defendant's Exhibit 1, consisting of the record on the appeal taken by plaintiff from an order granting a second trial in the Supreme Court of the State of New York 144, folios 5–18

53. Opinion of Mr. Justice Louis A. Valente upon granting defendant's motion for a new trial, set forth on pages 170 to 177, inclusive, of defendant's Exhibit 1, consisting of the record on the appeal taken by plaintiff from an order granting a second trial in the Supreme Court of the State of New York ..... 144, folios 510–530

54. Excerpt of testimony given by plaintiff upon the second trial held in the Supreme Court of the State of New York, said excerpt being contained in defendant's Exhibit 3 herein and consisting of the last question at folio 489, questions and answers appearing at folio 490 and the first two questions and answers appearing at folio 491, being contained on pages 163 and 164 of defendant's Exhibit 3, referring to the cross-examination of plaintiff, consisting of the record on the appeal taken by the defendant to the Court

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of Appeals of the State of New York from interlocutory judgment entered in the Supreme Court of the State of New York after the Appellate Division of the Supreme Court of the State of New York, First Department, reversed judgment in favor of defendant after a second trial in the Supreme Court of the State of New York .....

folios 489-

55. Judgment rendered on January 26, 1931, in the Supreme Court of the State of New York in favor of defendant and against plaintiff and dismissing plaintiff's complaint in said action in the Supreme Court of the State of New York, said judgment being set forth on pages 52 and 53 of defendant's Exhibit 3, consisting of the record on the appeal taken by the defendant to the Court of Appeals of the State of New York from interlocutory judgment entered in the Supreme Court of the State of New York after the Appellate Division of the Supreme Court of the State of New York, First Department, reversed judgment in favor of defendant after a second trial in the Supreme Court of the State of New York .....

folios 154-15

56. Opinion rendered by Mr. Justice Bernard L. Shientag prior to the entry of said judgment dismissing plaintiff's complaint, said opinion being set forth on pages 766 and 767 of defendant's Exhibit 3, consisting of the record on the appeal taken by the defendant to the Court of Appeals of the State of New York from interlocutory judgment entered in the Supreme Court

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of the State of New York after the Appellate Division of the Supreme Court of the State of New York, First Department, reversed judgment in favor of defendant after a second trial in the Supreme Court of the State of New York ..... 146, folios 2296–2300

57. Judgment of reversal entered on March 16, 1932, said judgment being an interlocutory judgment in favor of plaintiff and against defendant and reversing said judgment made by Mr. Justice Shientag on January 26, 1931, said interlocutory judgment of reversal being set forth on pages 784 to 787, inclusive, of defendant's Exhibit 3, consisting of the record on the appeal taken by the defendant to the Court of Appeals of the State of New York from interlocutory judgment entered in the Supreme Court of the State of New York after the Appellate Division of the Supreme Court of the State of New York, First Department, reversed judgment in favor of defendant after a second trial in the Supreme Court of the State of New York ..... 146, folios 2351–2361

58. Order of reversal of February 26, 1932, rendered by the Appellate Division of the Supreme Court of the State of New York, First Department, reversing judgment of January 26, 1931, made by Mr. Justice Shientag, and upon which order was predicated the judgment of reversal of March 16, 1932, said order being set forth on pages 772 to 784, inclusive, in defendant's Exhibit 3, consisting of the record on the appeal taken by the defendant to the

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Court of Appeals of the State of New York from interlocutory judgment entered in the Supreme Court of the State of New York after the Appellate Division of the Supreme Court of the State of New York, First Department, reversed judgment in favor of defendant after a second trial in the Supreme Court of the State of New York 1

59. Exemplified copy, and certificate of the Clerk of the County of New York pertaining thereto, of judgment entered on July 25, 1932, upon affirmance by the Court of Appeals of the State of New York of the interlocutory judgment rendered in the Supreme Court of the State of New York in favor of plaintiff and against defendant herein on March 16, 1932; said exemplified copy constituting plaintiff's Exhibit C at the trial hereof ..... folios 2314-23

60. Order made on April 20, 1933, by Mr. Justice Irwin Untermyer vacating a Referee's report submitted after hearings held subsequent to affirmance of interlocutory judgment in favor of plaintiff in the Supreme Court of the State of New York, said order appearing on pages 2 to 5, inclusive, of defendant's Exhibit 2, consisting of the record on the appeal taken by defendant from the order made in the Supreme Court of the State of New York on April 20, 1933, vacating a referee's report 132-136

61. Opinion rendered by Mr. Justice Irwin Untermyer in support of said order of April 20, 1933, vacating said Referee's report, appearing on pages 142 to 145, in- ..... 145, folios 5-15

Record pages.

clusive, of defendant's Exhibit 2, consisting of the record on the appeal taken by defendant from the order made in the Supreme Court of the State of New York on April 20, 1933, vacating a referee's report 145, folios 425–435

62. Order made by the Appellate Division of the Supreme Court of the State of New York, First Department, on October 13, 1933, affirming the order vacating Referee's report made by Mr. Justice Irwin Untermyer on April 20, 1933, and ordering, further, that Honorable Jeremiah T. Mahoney be appointed as Referee; said order being set forth on pages 42 and 43 of defendant's Exhibit 4, consisting of the record on the appeal taken by defendant from final judgment in plaintiff's favor in the Supreme Court of the State of New York ..... 147, folios 124–128

63. Certificate of Clerk of the Supreme Court of Ohio 248

1. On the 8th day of July, 1938, petitioner, by his attorneys, filed with the clerk of this Court his petition in proper form, for a writ of certiorari to the Supreme Court of the State of Ohio to review here the order or judgment of that court and the judgment of the Court of Appeals, Franklin County, State of Ohio, supported by brief, and which petition is now pending before this Court.

2. The sole question for adjudication here presented by the petition for certiorari, is whether the Supreme Court of the State of Ohio and the Court of Appeals, Franklin County, State of Ohio, denied to petitioner the title, right,

privilege and immunities, secured to him under Article IV Section 1 of the Constitution of the United States by the failure and refusal to give to the judgment secured by the petitioner against respondent in the Supreme Court of the State of New York, the full faith and credit required to be given said judgment by said Article IV, Section 1 of the Constitution of the United States and the statutes of Congress enacted pursuant thereto and the full faith and credit it had and still has in the State of New York, under the laws of that State. Such failure to accord said judgment of the Supreme Court of the State of New York, full faith and credit under said Article IV, Section 1 of the Constitution of the United States, was predicated on the stated ground that petitioner was not the real party in interest in the Supreme Court of the State of New York and that in failing to disclose such fact, he had procured said judgment by fraud practiced upon the Supreme Court of the State of New York and upon respondent. This presents the sole question and furnishes the principal reason for invoking the jurisdiction of this Court. The Supreme Court of Ohio dismissed petitioner's appeal as of right to that court and granted respondent's motion to dismiss the appeal as of right, on the ground that no debatable constitutional question was involved.

3. On the 8th day of July, 1938, petitioner, by his counsel, filed with the clerk of this Court, as transmitted to his counsel by the clerk of the Supreme Court of the State of Ohio, a copy of the complete record of this case in the Supreme Court of Ohio, bearing proper certificate of the clerk of that court.

4. The copy of the record so filed contains 243 typewritten pages, legal size and approximately 3,000 printed pages of exhibits, amounting in all to approximately 3,240 pages.

5. The cost of printing the complete record and exhibits in the Supreme Court of the State of Ohio, as transmitted under the certificate of its clerk and filed in this Court, would be approximately $6,500, while the printing of only the relevant portions of the record above designated, amounting to approximately 250 pages, will cost not to exceed $500.

6. An examination of this record discloses that it naturally divides itself into two distinct parts: One part concerns itself with the constitutional question which is completely embodied in the relatively small part of the record above scheduled. The other portions of the record are concerned with testimony, pleadings, orders and decisions relating to questions of fact, litigated in the original action in the courts of the State of New York and which were foreclosed to further consideration by the judgment of the Supreme Court of New York, or are concerned with issues of local practice and procedure in Ohio that have been finally and fully determined by interlocutory rulings and orders in the litigation, which have no bearing upon the constitutional question at issue in this Court. The record of the proceedings had in the State of Ohio, with the exception of the aforementioned local practice and procedural matters and exhibits consisting of records of proceedings in the courts of the State of New York, has been incorporated in full in the aforementioned schedule, and such record contains all possibly necessary and relevant portions of the testimony and exhibits in the New York and Ohio proceedings, which in any way tend to have a bearing upon the constitutional question before this Court. With respect to the New York proceedings the aforementioned schedule sets forth the pleadings, the final judgment, various orders of affirmance or reversal, as the case may be, interlocutory judgments, such opinions of the New York

court as are not officially reported and such excerpts from testimony given or affidavits filed in the New York proceedings as affect the question as to whether your moving party perpetrated a fraud upon the New York courts in prosecuting a cause of action against respondent therein. The aforementioned schedule omits reference to testimony and exhibits in the New York proceedings which relate, strictly, to the merits of petitioner's cause of action against respondent or to the proceedings before the referee, relative to the computation of damage, pursuant to which final judgment was rendered in the State of New York. It also omits reference to the proceedings before the second referee whose report was vacated, as well as to subsidiary matters relative to respondent's application for a new trial after the judgment in his favor was reversed for the first time by the Appellate Division. Said aforementioned schedule omits reference to such procedural matters in the Ohio proceeding as relate, among other things, to whether service of the original summons should be set aside, various orders relating to the filing of briefs or amended pleadings, and proceedings relative to interrogatories submitted by defendant with his answer. In summary, the great bulk of the record filed with the clerk of this Court on the 8th day of July, 1938, consists of exhibits offered in evidence in the Court of Common Pleas, Franklin County, Ohio, by respondent, setting forth the printed records on appeal utilized in the New York proceeding and the aforementioned schedule sets forth such portions thereof as are necessary to give a proper background for adjudication with respect to the final judgment rendered in Ohio. Petitioner asks leave merely to proceed on an abbreviated record which will, essentially, omit testimony and exhibits offered in the New York proceeding referable to the merits of the original cause of action or to proceedings before referees.

7. It is our endeavor in making the within motion to avoid the imposition upon this Court of the wholly unnecessary burden of examining and considering a record of unusual and extreme length, in view of our firm conviction that a concise record as herein proposed, will amply and effectually present the entire question under review and that the inclusion of the entire record can serve no useful purpose. Petitioner's counsel, furthermore, are cognizant of this Court's disapproval of lengthy records containing extraneous matter, to which utterance was given in *Texas Pacific R. Co.* v. *Leatherwood*, 250 U. S. 478, at page 482.

8. That the expense to petitioner, if required to print the entire record, would be so burdensome, as to preclude him from appearing before this Court and that he would be thereby disenfranchised from his constitutional rights, after carrying on this litigation for a period of thirteen years, at a tremendous personal expense.

9. On May 31, 1938, counsel for petitioner, practicing in the City of New York, visited the offices of counsel for respondent at Columbus, Ohio, and attempted to arrange for a stipulation for the printing of the material portions of the record, mentioning the items to be included therein as follows: The pleadings in the Ohio action, motion to strike out defenses therein, the minutes of the trial in Ohio, the exhibits offered thereat, excluding, however, the records on appeal used in the courts of the State of New York, the judgments and opinions rendered in Ohio, the notices of appeal and the motions relative thereto, petitioner's requests to the Ohio trial court to make certain findings, together with the trial court's rulings thereon and the pleadings and final judgment in the Supreme Court of the State of New York. At that time respondent's counsel suggested other and additional items to be included in the record by stipulation, but did not agree definitely to enter-

ing into any stipulation. Counsel for respondent suggested that certain unreported opinions in the State of New York be included, together with the order made in the State of New York granting a second trial after judgment of reversal was entered in favor of petitioner in the Supreme Court of the State of New York for the first time. As a basis for possible stipulation with respect to abbreviating the printed record herein to its material portions, counsel for petitioner agreed to include whatever might be desired by counsel for respondent and filed a praecipe with the clerk of the Supreme Court of Ohio on June 1, 1938, which praecipe embodied the items originally suggested by petitioner's counsel, the items suggested by respondent's counsel, as well as certain other items made necessary by reason of the suggestions made by respondent's counsel. Petitioner's counsel caused a copy of said praecipe to be served upon counsel for respondent on June 1, 1938, and counsel for petitioner likewise prepared a proposed stipulation, embodying the items set forth in said praecipe, to be used for the purpose of providing an abbreviated record herein. On June 8, 1938, counsel for petitioner were advised by their correspondent at Columbus, Ohio, that word had been received, in writing, from counsel for respondent that the entire record should be filed herein; and counsel for respondent disregarded the procedure whereby proper stipulation may obviate the necessity for printing an entire record. In view of the failure of respondent's counsel to stipulate for an abbreviated record herein, counsel for petitioner arrived at Columbus, Ohio, on June 10, 1938, for the purpose of preparing and filing a praecipe with the clerk of the Supreme Court of Ohio, calling for the preparation of a full transcript of the record. On said date, counsel for petitioner called at the office of counsel for respondent for the purpose of making further effort with respect to entering into an appropriate stipulation

herein, but he was informed that respondent's counsel was not in Columbus on said day and that he was not expected to return until June 13, 1938. Under the circumstances and by reason of the lapse of time, petitioner herein found it necessary to proceed in accordance with this motion to print an abbreviated record.

Counsel for petitioner believes that in the foregoing has been listed every portion of the record that is, in any manner whatsoever, material to consideration of the constitutional question raised herein and your moving party makes no objection to the inclusion, in the part of the record to be printed, of any other portion of the record shown, or found by this Court, to be material to the determination of the constitutional question.

Respectfully submitted,

THOMAS I. SHERIDAN,
AARON FRANK,
Counsel for Petitioner.

P. S.

SUPREME COURT OF THE UNITED STATES.

No. 188.—October Term. 1938.

Edward H. Titus, Petitioner, *vs.* Lou C. Wallick. } On Writ of Certiorari to the Supreme Court of the State of Ohio.

[February 27, 1939.]

Mr. Justice Stone delivered the opinion of the Court.

The question for decision is whether the Supreme Court of Ohio, by denying recovery upon a judgment procured by petitioner against respondent in the courts of New York, has failed to accord to the New York judgment the full faith and credit which Article IV, § 1 of the Constitution commands.

Petitioner brought the present suit against respondent in the Ohio Court of Common Pleas upon a judgment recovered by petitioner against respondent in the Supreme Court of New York on May 1, 1934. Transcript of the New York judgment for $389,103, duly authenticated in conformity to the Act of Congress, R. S. § 905, 28 U. S. C. § 687, was filed with the petition in the Ohio court. Defenses interposed by respondent, so far as now material, were that petitioner was not the real party in interest in the Ohio suit and that the judgment had been procured in New York by fraud on the court and on respondent, in that petitioner was not the real party in interest entitled to assert the claim litigated in that suit as required by § 210 of the New York Civil Practice Act, and that petitioner, in procuring the judgment, suppressed and withheld that fact from respondent and the New Yo k courts.

The Court of Common Pleas, after a t ial without a jury, sustained these defenses and gave judgment for respondent, which the Ohio Court of Appeals for Franklin County affirmed, with an opinion in which it ruled that the judgment sustaining the defenses did not deny the New York judgment the full faith and credit required by the Constitution. Appeal to the Supreme Court of Ohio assigning as error the denial of full faith and credit to the New York judgment was dismissed on the ground that the case

involved "no debatable constitutional question". 133 Ohio St. We granted certiorari October 10, 1938, the constitutional que presented by the petition being of public importance and the eral right asserted having been ruled upon and denied by the est court of the state. *Matthews* v. *Huwe*, 269 U. S. 262; *To* v. *Ohio*, 273 U. S. 510, 515.

Petitioner brought the New York suit in December, 1925, a ing that he was the owner of a quarter interest in two hun and fifty shares of the stock of an Ohio corporation which resp ent here, the defendant there, had fraudulently appropriated to own use. The relief sought was that respondent be directed to liver to petitioner certificates of stock representing his interest in corporation and to account for the dividends and earnings on stock received by respondent. Respondent appeared person and defended the suit. It was twice tried in the Supreme Co of New York and was five times before the Appellate Division the Supreme Court, 222 App. Div. (N. Y.) 17; 227 App. D N. Y.) 789; 235 App. Div. (N. Y.) 662; 240 App. Div. (N. Y.) 6 244 App. Div. (N. Y.) 789, and once before the New York Court Appeals, 260 N Y. 519, which affirmed a judgment establishing liability of respondent. An accounting, at the end of nine years litigation, resulted in the final judgment sued upon, which w affirmed by the Appellate Division. 244 App. Div. (N. Y.) 789.

The present record discloses that after entry of this judgme London Wallick, a brother of respondent, brought suit in t Supreme Court of New York to recover from petitioner a share the judgment pursuant to a contract alleged to have been enter into by him with London Wallick on or about November 2 1925. In resisting a motion made in that suit for an injunctio restraining petitioner from disposing of the judgment or its pr ceeds, petitioner prepared and filed an affidavit reciting that on before November 23, 1925, he had informed London Wallick tha he had already assigned his interest in the claim against respond ent to his wife and to Walter Titus, his brother, and asserting that "it does not lie within the jurisdiction of this court to enjoin what has already been accomplished".

The assignment by petitioner and a later reassignment of the claim to him were introduced in evidence in the present suit. The assignment, dated March 31, 1924, purported to "sell, a sign, transfer and set over unto" Walter Titus "any and all claims" which

petitioner then had against respondent. The reassignment, described by its terms as an "Agreement", bears date December 1, 1925, prior to the suit brought by petitioner against respondent in New York. It recites that the earlier assignment was made upon an oral agreement that Walter Titus was to "use any funds that might be derived" from the claim to the two hundred and fifty shares of stock to pay certain indebtedness of petitioner and that petitioner "wishes to institute an action against" respondent "to recover said stock." It states that Walter Titus "does hereby sell, assign, transfer and set over" to petitioner "all his right, title and interest" in the claim and appoints petitioner his attorney to collect the claim. It further recites an agreement between the assignor and petitioner that the latter will turn over the proceeds of the claim to the assignor, who agrees, after paying the expenses of collection, to pay over one-half of the net recovery to petitioner's wife, to discharge certain indebtedness of petitioner, and to pay the balance to him.

The Ohio Court of Appeals disagreed with the conclusion of the trial court that petitioner's affidavit in the London Wallick suit conclusively established that petitioner had no interest in the claim prosecuted against respondent in New York. It held that his interest was to be ascertained by examination of the reassignment from Walter Titus to petitioner. But interpreting that document in the light of the New York law it concluded that the reassignment was no more than a power of attorney authorizing petitioner to collect the claim in behalf of Walter Titus and did not operate as an assignment to vest any right or interest in petitioner upon which he could maintain suit in the New York Courts. Upon examination of petitioner's affidavit indicating, as the court thought, that petitioner had construed the reassignment correctly as not transferring to him any right or interest in the claim against respondent, it accepted the affidavit as evidence that petitioner had fraudulently prosecuted the New York suit against respondent with knowledge that he was not entitled to maintain it. The court accordingly affirmed the judgment of the trial court denying recovery, on the ground that the New York judgment, impeachable there for the fraud, was to the same extent impeachable in Ohio.

By R. S. § 905, 28 U. S. C. § 687, enacted under authority of the full faith and credit clause, Article IV, § 1 of the Constitution, the duly attested records of the judgments of a state are entitled to "such faith and credit . . . in every court within the United

States as they have by law or usage in the courts of the State from which they are taken". The jurisdiction of the New York court over the subject matter and the person of respondent, established prima facie by the present record and the duly authenticated record of the judgment, is not questioned. But respondent argues, as the state court held, that under the Constitution and Act of Congress the judgment is entitled to no more credit in Ohio than is accorded to it in New York and that in New York the judgment is impeachable for petitioner's fraud in prosecuting the suit, knowing that he had no interest in the cause of action sufficient to enable him to maintain it.

The right asserted by petitioner to have the New York judgment enforced in the courts of Ohio is one arising under the Constitution and a statute of the United States. And since the existence of the federal right turns upon the legal effect of the proceedings in New York and the validity of the judgment there, the rulings on those points by the Ohio court are reviewable here. *Adams v. Saenger*, 303 U. S. 59, 64. While they involve questions of local law and are of a character such that this court ordinarily reexamines them with deference after they have been passed upon by a state court, its determination cannot be accepted here as decisive if the constitutional command is to be observed, especially as the decision of the state court rests not on the law of its own state or matters peculiarly within its cognizance, but upon the law of another state which is as readily determinable here as in the courts of Ohio.

We do not stop to consider the question much discussed in brief and argument how far the full faith and credit clause precludes the defense that the judgment sued upon in one state was procured by fraud in another, for we think it plain that the present judgment is subject to no such infirmity. It is evident that no fraud was perpetrated on respondent or on the New York courts if the assignment of the claim to petitioner before he brought the suit in New York operated to vest him with such ownership or interest in the claim as would enable him to maintain the suit upon it there. If the assignment had that effect, the facts that it was given for the purpose of enabling petitioner to bring the suit, and that he was bound to account to a stranger to the suit for its proceeds, are immaterial, since neither the court nor respondent was prejudiced by petitioner's failure to disclose them.

Personal Property Law (Consol. Laws, c. 41).

Choses in action, with exceptions not now material, are made fully assignable by the New York statute. Chapter 43, § 41, Consolidated Laws of New York. Section 210 of the New York Civil Practice Act provides "Every action must be prosecuted in the name of the real party in interest, except that . . . a trustee of an express trust . . . may sue without joining with him the person for whose benefit the action is prosecuted." By repeated decisions of the highest court of the State of New York it has long been settled that under these sections any form of assignment which purports to assign or transfer a chose in action confers upon the transferee such title or ownership as will enable him to sue upon it. This is true even though the assignment is for the purpose of suit only and the transferee is obligated to account for the proceeds of suit to his assignor. *Allen* v. *Brown*, 44 N. Y. 228; *Meeker* v. *Claghorn*, 44 N. Y. 349; *Sheridan* v. *Jayne*, 68 N. Y. 30; *McCauley* v. *Georgia Railroad Bank*, 239 N. Y. 514; *Meyers* v. *Credit Lyonnais*, 250 N. Y. 399; *Banca C. I. Trust Co.* v. *Clarkson*, 274 N. Y. 69, 74; *Brown* v. *Powers*, 53 App. Div. (N. Y.) 251; *Birdsall* v. *Reed*, 188 App. Div. (N. Y.) 46.

Here the assignment, which in plain terms purported "to sell, assign, transfer and set over" the chose in action to petitioner, was sufficient under the New York statutes and authorities to give petitioner dominion over the claim for purposes of suit. In that respect its legal effect was not curtailed by the recital that the assignment was for purposes of suit and that its proceeds were to be turned over or accounted for to another. The Ohio court, placing emphasis on the presence of the power of attorney in the assignment, disregarded the words of assignment and gave to the instrument the more restricted effect of a power of attorney. While a power of attorney to sue, standing alone, does not under the New York law operate as an assignment to vest the attorney with such title or interest as will enable him to maintain the suit in his own name, *Spencer* v. *Standard Corporation*, 237 N. Y. 479, the addition of the power to petitioner's assignment did not deprive it of its force and character as an assignment. The use of the power of attorney, once for historical reasons the indispensable adjunct of every assignment of a chose in action, Ames, Lectures on Legal History, 210 *et seq.*, Williston on Contracts, Rev. Ed. §§ 405, 408, did not render the assignment ineffective merely because, by virtue of the statute, its presence is no longer necessary.

Even though petitioner was disingenuous in omitting to r
the reassignment of the claim in his affidavit in the London Wa
suit, and even though there was fraudulent purpose in his fai
to disclose that he still had some interest in the proceeds of
judgment to which London Wallick was asserting a claim, these
cumstances did not impair the previous assignment of the clai
him or deprive him of the authority, already conferred by the
assignment, to maintain the suit. Whether petitioner's transacti
with London Wallick gave the latter any equitable claim to
judgment or its proceeds does not appear, but in any case the ex
ence of such collateral claims does not subject the judgment to
peachment by the judgment debtor. *Matter of Holden*, 271 N.
212, 217.

Respondent also urges that the Court of Appeals rested
affirmance of the judgment of the trial court on the ground th
petitioner was not the real party in interest entitled to maint
the suit in Ohio, and that this is a non-federal ground adequate
support the judgment and is not reviewable here. While the cou
intimated that petitioner was not the real party in interest in Oh
it evidently rested this conclusion upon its opinion that petitio
was not the real party in interest in the suit in New York. I
opinion states that if the assignment "transferred any such leg
or equitable interest or both in his claim to the plaintiff [petitioner
as would entitle him to maintain an action in his own name in Ne
York, then he was a proper party in interest there and a prop
party in interest here."

When a state court refuses credit to the judgment of a sist
state because of its opinion of the nature of the cause of action
the judgment in which it is merged, an asserted federal right
denied and the sufficiency of the grounds of denial are for thi
court to decide. *Huntington* v. *Attrill*, 146 U. S. 657, 684; *Kenn*
City Southern Ry. v. *Albers Commission Co.*, 223 U. S. 573, 59
Kenney v. *Supreme Lodge*, 252 U. S. 411, 415. So far as the cour
rested its decision on its view that the New York assignment con
ferred no right on petitioner to maintain the suit there, it is enough
as we have pointed out, that the petitioner was the real party in
interest entitled to maintain the suit in New York. So far as Ohio
might apply a different rule if the original cause of action were
prosecuted in its courts, that fact is irrelevant to any issue now
presented. The suit in Ohio was not upon the assigned cause of

sion but upon the judgment of which petitioner is the record owner. The suit upon it is upon a different cause of action from that merged in the judgment. *Milwaukee County* v. *White Co.*, 296 U. S. 268, 275. It is the judgment and not the cause of action which gave rise to it for which credit is claimed, and the constitutional mandate requires credit to be given to a money judgment rendered on a civil cause of action in another state, even though the forum would have been under no duty to entertain the suit on which the judgment was founded. *Christmas* v. *Russell*, 5 Wall. 290; *Fauntleroy* v. *Lum*, 210 U. S. 230; *Roche* v. *McDonald*, 275 U. S. 449; *Milwaukee County* v. *White Co.*, *supra*, 277.

Even though the Ohio court might have declined to recognize petitioner as the proper party to sue upon the assigned claim, a suit upon a judgment of another state, by virtue of the Constitution, stands upon a different footing. The Ohio court is not free to withhold from petitioner, the record owner of a judgment valid and enforceable by him in New York, the full benefit of the constitutional command that the judgment shall receive in the courts of Ohio such faith and credit as it is entitled to receive in New York. A state which may not constitutionally refuse to open its courts to a suit on a judgment of another state because of the nature of the cause of action merged in the judgment, *Kenney* v. *Supreme Lodge*, *supra*, 415, obviously cannot, by the adoption of a particular rule of liability or of procedure, exclude from its courts a suit on the judgment.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.